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COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
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I. INDIGENT DEFENSE NEWS

WITH GRATITUDE FOR OUTSTANDING SERVICE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES PROUDLY ANNOUNCES ITS 2003 AWARDS RECIPIENTS

The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.

STANLEY FISHER, ESQ.

Stanley Z. Fisher is a graduate of Oberlin College and Yale Law School, and has been a Professor of Law at Boston University Law School since 1968, following a four year tenure as Assistant Professor of Law at Haile Sellassie I University in Addis Ababa, Ethiopia. Stan is being honored today for his career-long and invaluable contributions to the betterment of our wobbly and imperfect system of criminal justice.

Just weeks ago, the B.U. Public Interest Law Journal published Stan's excellent and detailed article, *Convictions of Innocent Persons in Massachusetts: An Overview*. This work not only details the specific cases of justice gone awry: it also specifies the causative factors such as flawed identification procedures, and police and prosecutorial misconduct, which permit innocent people to be convicted despite the existence of constitutional protections. And it calls for specific reforms – an Official Commission of Inquiry, an Innocence Protection Act, compensation for innocent individuals whose lives have been damaged by unjust convictions -- which everyone who cares about the fairness and accuracy of our criminal justice system should endorse.

Stan is a founding member of the New England Innocence Project, which helps wrongfully convicted persons win their freedom and restore their lives. He has used his teaching sabbaticals to work with the Juvenile Court Advocacy Program at the Boston Legal Assistance Project in 1975-1976, as a prosecutor with the Norfolk county District Attorney's Office in 1982-1983, and as a public defender with the CPCS Boston Trial Unit in 1989-1990. He has written other influential law review articles, including *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L.Rev. 1379 (2000); "*Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 New England L. Rev. 1 (1993); and *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. Law 197 (1988). Stan co-edited the first two publications of that invaluable criminal defense practice guide, Massachusetts Criminal Practice, and continues as a contributor.

We are humbled by the enormity of Stan Fisher's many contributions to the improvement of criminal justice in Massachusetts. He is the richly deserving recipient of this year's Thurgood Marshall Award.

The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.

JENNY CHOU, ESQ.

It gives us great pleasure to announce Jenny Chou, Project Coordinator of the Edlaw Project as the recipient of this year's Blitzman Award. Jenny not only exemplifies dedication and commitment to children's rights but also has been a trailblazer in providing high quality representation to children in Boston's schools.

All children need educational achievement to succeed and all communities need an educated citizenry to thrive. The impact of student failure and academic underachievement is far reaching, affecting every child's personal development and future access to jobs, healthcare, and adequate housing. An overwhelming number of children in the low-income areas of Boston are not achieving academically according to their aptitude. Many of these children do not have access to appropriate education services and lack access to an advocate who can fight for their education rights.

Jenny has been the Project Coordinator for the EdLaw Project for just two and one half years, but has quickly established herself as one of the leading experts in this state on education law. She has worked relentlessly to achieve EdLaw's goals ensuring young people access to appropriate education services in the city of Boston. Without prior expertise in educational law, Jenny trained herself in this area and then trained and supervised two new attorneys and six interns and has successfully instilled in them the same passion and enthusiasm for zealous legal advocacy which she exhibits. Attorneys, advocates, youth workers and families all over the city now look to Jenny for advice, consultation and information on student's rights. Under Jenny's supervision and direction, the Edlaw Project has become the state's foremost defender of children's educational rights and has advocated successfully for over 200 students in Boston.

The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.

LAURA SANFORD, ESQ.

Laura Sanford graduated from Boston College Law School in 1980 and began her career as an Assistant District Attorney in Middlesex County, then practiced civil litigation for 20 years. She took a break from the practice of law to pursue other creative interests and to find an even more meaningful and fulfilling career. On a serendipitous afternoon while walking her Border Terrier puppy in the Lexington woods she met Judge Michael Brooks who suggested that she get

involved with Mental Health litigation with the Committee for Public Counsel Services. She has taken it on with passion and deep concern, not only her clients' rights, but for their feelings as well. She was nominated for this award by the mother of one of her clients who praised her "zealous efforts and advocacy on behalf of those with mental health and legal needs. Laura's concern and professionalism should as an inspiration and a benchmark of societal responsibility for all."

Laura lives with her husband and her dog and practices law in Lexington.

The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.

MICHAEL KILKELLY, ESQ.

Michael Kilkelly is a graduate of Boston College Law School. Since starting his private practice almost 20 years ago, he has represented countless children and parents in care and protection, CHINS and termination of parental rights cases at both the trial and appellate levels. He represented the father in the landmark case of Care and Protection of Robert, 408 Mass. 52 (1990), in which he successfully argued that application of a "reasonable cause standard" at the 72-hour hearing violated his client's constitutional rights. His other published opinions include Adoption of Sherry, Adoption of Paula, and Care and Protection of Ian.

As a mentor for the CAFL trial and appellate panels, he has provided innumerable hours of guidance and assistance to attorneys new to this practice. Until 2001, he was CAFL's regional coordinator for Middlesex County, providing advice and technical assistance to CAFL attorneys in the region and serving as a liaison between the bar, the courts and the community. He has shared his expertise by teaching at numerous training programs including the CAFL trial panel certification training and the CPCS annual training conference. Attorney Kilkelly has demonstrated extraordinary commitment to child welfare practice, both through his direct representation of individual clients, and through the support he has provided the CAFL program over the years.

The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.

JOSEPH F. KROWSKI, ESQ.

Joseph F. Krowski is a 1977 graduate of Suffolk University Law School who has practiced law in the Brockton area for more than twenty-five years. Joe has handled murder cases for

indigent defendants since 1983. He is also certified for criminal appeals. Before joining the bar, Joe was a merchant marine and crime reporter for the Brockton Enterprise covering the Plymouth Superior Court. Held in high esteem by defenders, judges and prosecutors, Joe is known for taking the tough cases and for winning cases others thought were not winnable. In a case that garnered national attention, Joe recently represented a member of an Attleboro religious group that rejects the principles of modern medicine, government and science. In one of the toughest of CPCS assignments, Joe stepped in to handle the fourth trial in the case of Comm. v. James Kater, a matter that began in 1978 and generated seven Supreme Judicial Court opinions. Joe is a tenacious fighter for his clients and an outstanding trial lawyer. CPCS is pleased to honor Joseph F. Krowski as the recipient of the 2003 Edward J. Duggan award for zealous advocacy.

BRUCE FERG, ESQ.

Bruce Ferg is a 1974 graduate of Northeastern University School of Law. He began his legal career with the Brockton office of the Massachusetts Defenders Committee in September, 1974. Bruce worked as a public defender staff attorney for the next 12 years, including a one-year stint in the Appeals Unit. In 1986, Bruce entered private practice in Brockton, where he did a mix of criminal and civil practice. In 1995, Bruce returned to the Committee for Public Counsel Services, rejoining the Brockton office. He currently works as a staff attorney in the Public Defender Division office in Cambridge.

Bruce is a remarkably experienced and accomplished attorney, achieving great results for clients in both the trial and appellate arenas. Over the last 29 years, Bruce has tried nearly 300 jury trials, including almost 20 murder trials, and he has also handled more than 40 appeals. A tireless worker and student of the law, Bruce is in the office early, and always among the last to leave at night. His pursuit of cutting-edge issues has resulted in important developments in the law, but has always been accompanied by great humility and an absence of fanfare. Bruce is a source of invaluable experience and learning, and he is generous to a fault.

His colleagues know that if they ask him a question, Bruce will supply the answer, the case or statutory citation to support the answer, and, as all good teachers do, he teaches his "students" how to find the answers themselves in the office library he so painstakingly maintains. Bruce has been a frequent contributor at CPCS, MCLE, and bar association training sessions.

The 2003 CPCS Annual Training Conference was a great success. The Training Unit would like to send a special thank you to the following people who volunteered their time to speak at the Conference: **Keynote Speaker Steven Harmon, Esq; Stephanie Page, Esq; Norah Kane, Esq; Dorothy Storrow, Esq.; Leslie Walker, Esq.; Benjamin Keehn, Esq.; Miriam Conrad, Esq.; Shannon McAuliffe, Esq.; William Leahy, Esq.; State Rep. Hank Naughton; Martin Healy, Esq.; Charles McGinty, Esq; Lisa Steele, Esq.; Police Captain Massad Ayoob; Alice Carter, PhD; Ron Benham, M.Ed; Carol Donovan, Esq.; Lisa Grant, Esq.; Stan Goldman, Esq.**

II. CHIEF COUNSEL'S MESSAGE

Let's face it. Every single person who devotes a substantial portion of his or her time to the representation of the indigent gets worn down from time to time by the sheer enormity of the challenge, or the absence of societal support, or the lousy compensation. In recent days, I have been fortunate to receive two lucid and eloquent communications which express the personal satisfactions which, for most of us on most days, overcome those grim realities. The first is from Randy Gioia, President of Suffolk Lawyers for Justice, writing in the SLJ May/June News

Bulletin about motivation. For Randy, one big source of motivation is "the people we represent."

> This work is difficult because the people we represent…are outcasts….
> Often they meet their lawyer for the first time in a crowded lock-up.
> They know their court-appointed lawyer is paid by the same entity
> that pays the judge and the prosecutor…. It takes time for trust to
> grow between a lawyer and his or her client. The system exerts a
> pressure to "move the case", not to build trust. We need to take the
> time to build the trust with our clients by meeting with them promptly
> after the arraignment, by finding and interviewing the witnesses that
> are needed in their defense, by looking for the Achilles heel in the
> prosecution's case, by preparing the case for trial so we can get the best plea, by
> being known as a fighter and a pain in the neck. Often our
> clients are looking for someone to be on their side, someone to see them
> as a person and not another case. If, at first, they are rude and skeptical,
> we need to smile and understand. If we have the right attitude, eventually they will
> see that we care and we are there to help them through a
> difficult part of their lives.

A couple of weeks ago, I received a letter from Suzanne Rapoza, who is a former CPCS public defender in the Brockton and Springfield offices. Suzanne wrote from Kodiak, Alaska, where she now resides due to her husband's employment. She reflected upon her years as a public defender:

> I am proud to have worked for an organization devoted to principles
> of justice and equality for those who have experienced little of either.
> For me, CPCS embodies the goodness in humanity: service to others,
> excellence, fairness, and compassion….
>
> At times, when I felt besieged…I knew I could count on a powerful
> organization: one rooted in the founding principles of our justice
> and political system and yet daring to swim against popular political currents of
> easy solutions, blame, anger, and bitterness; an
> organization that divines its power from its principles and its staff
> who work daily for these principles at great personal sacrifice; and an organization
> that stands behind its staff in difficult circumstances.
>
> I could always depend on support from my supervisors and colleagues
> in Springfield and Brockton. I knew I had years of trial and appellate experience
> and brilliant legal minds at my fingertips. I never hesitated
> to call other CPCS attorneys at any time for sage advice…. Everyone
> was eager to help, even in the middle of my trial and their lunch.
> Moreover, those I called were then interested in the outcome of my [case]
> and would call to follow up. This team effort further empowered me
> to do an often difficult job.
>
> … I hope, after my children are older, to return to advocating for compassion and

fairness in the criminal courts.

Messages such as these lift my spirits as we work in such difficult circumstances to achieve the level of fiscal and political support which we need, and the Constitution requires, to provide competent and vigorous representation to every one of the quarter-of-a-million poor persons whom we represent each year in cases of great importance. I hope you find them inspiring as well.

III. CASENOTES

The following casenotes summarize decisions released in November, December 2002 and January 2003. The Casenotes were written by David Skeels, Esq, of the CPCS Appeals Unit. We are grateful for his time, hard work, and contribution. (Always Shepardize, and check for any modifications by further appellate review.)

ADMISSIONS AND CONFESSIONS: MIRANDA; MEANING OF "CUSTODY"
See Commonwealth v. Brum, 438 Mass. 103 (2002) (The rule of Michigan v. Mosley only applies to those in continuous custody and defendant was not initially in custody).

The case of Michigan v. Mosley, 423 U.S. 96 (1975) holds that if a defendant while in custody exercises his right to remain silent then the police must scrupulously honor this request. In this case, however, the defendant was not in custody when he exercised his right to remain silent, so the rule of Michigan v. Mosley did not apply. Commonwealth v. Brum, 438 Mass. at 111-112.

The defendant voluntarily went to the police station where he was advised of his Miranda rights and questioned for twenty minutes. When he said that he did not want to answer any more questions, he was allowed to go home. A few minutes after the defendant was dropped off at his home, the police received a dispatch to arrest the defendant. The defendant was brought back to the police station, advised of his Miranda rights again, and agreed to give a statement. Id . at 109-110. The Court held that the statement was admissible because the defendant was not in custody when he exercised his right to remain silent. Id. at 111-112. See **Evidence, hearsay, Bruton** and **Murder, felony-murder** for additional discussion of this case.

ADMISSIONS AND CONFESSIONS: MIRANDA; MEANING OF "CUSTODY"
See Commonwealth v. Sneed, 56 Mass. App. Ct. 391 (2002), further appellate review **granted** 438 Mass. 1108. (Statements suppressed; defendant in custody even though not arrested and interrogation at home)

The defendant was questioned in her own apartment and was not arrested. She was not given her Miranda rights and her statements were suppressed because she was in "custody" for purposes of Miranda. Commonwealth v. Sneed, 56 Mass. App. Ct. at 392.

A Court looks at four factors to determine whether a person is in custody for purposes of Miranda: (1) the place of interrogation, (2) whether the interrogation had begun to focus on the defendant, (3) whether the interview was aggressive or informal, and (4) whether the suspect reasonably believed he or she was free to leave. Id. at 393.

The Appeals Court upheld the motion judge's findings that (1) a reasonable person would have perceived the setting as isolative and coercive, (2) the investigation had focused on the defendant and the police conveyed their suspicions in an accusatory manner, (3) the questioning was aggressive, and (4) the defendant reasonably believed that she was not free to leave and end

the interrogation. Id. at 393-396.

In this case the defendant was a seventy year old woman who had been sick for four days suffering from asthma. Her illness required her to remain close to her nebulizer in her home. The state police arrived at her apartment unannounced. She answered the door in pajamas and sweatpants and, although she advised the police that she was ill, the police nevertheless asked to enter the apartment. The interrogation lasted for two hours and only ended when the police obtained the information they wanted. During this two hour period the defendant was repeatedly confronted with the evidence against her. The defendant had to use the nebulizer on several occasions, and sought emergency treatment three hours after the interrogation ended. On several occasions the defendant asked if she should call a lawyer and the police told her that she should call a priest for her gambling problem. The defendant was never told that she did not have to answer questions, or that she could end the questioning and order the police to leave whenever she wished. Id. at 392, 392-93, 395-96.

ADMISSIONS AND CONFESSIONS: MIRANDA; MEANING OF "INTERROGATION"

See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641 (2002) (Statements not suppressed; Miranda had no application to statements which the defendant made while in custody because the statements were not made in response to questioning).

The police picked up the defendant on a murder warrant and were driving him back to Massachusetts. The trial judge found that on the way the defendant engaged in "congenial conversation" with the police and asked the police a series of questions. Id. at 644. He asked about the BRD and then told the police that the BRD had been harassing him in his apartment, had broken windows, were shooting a shotgun in the nearby alleyway and "messing with us." He asked if the co-defendant shooter had been caught, and, when the police said that he had, the defendant said, "That night [the co-defendant] did this thing and fucked up my life."Id. at 645. The Court agreed with the trial judge that the statements were admissible because they had not been elicited by the police. Id. at 645.

ADMISSIONS AND CONFESSIONS: MIRANDA; MEANING OF "CUSTODY" AND "INTERROGATION"; REQUEST FOR COUNSEL

See **Commonwealth** v. Barros, 56 Mass. App. Ct. 675 (2002) (evidence suppressed; defendant in custody; shoes and clothing obtained through interrogation; later statement suppressed because police reinitiated questioning after defendant invoked the right to counsel).

The judge's finding that the defendant was in custody when questioned at his home was upheld by the Appeals Court. The police testified that they had a default warrant for the defendant's arrest for disturbing the peace but they did not intend to execute the warrant unless their interview with him about a murder charge proved fruitful. Id. at 676. The default warrant was merely used to gain entrance to the defendant's home in order to question him. Id. at 676. The police advised the defendant that they had a warrant for his arrest and immediately began to question him in a small room in his house without giving him Miranda warnings. The defendant was seventeen years old, was dressed in a T-shirt and boxer shorts and appeared to have been sleeping. Id. at 677.

The Appeals Court also upheld the judge's finding that the clothing and sneakers which the police observed in the defendant's bedroom were the product of interrogation. Inculpatory statements are deemed a product of custodial interrogation where they are offered in response to

"any words or actions on the part of the police" which are "reasonably likely to elicit an incriminating response from the suspect." Id. at 678-79. The police asked the defendant if he owned a paint ball gun, and the defendant said he had sold his gun but he still had the box if the police wished to see it. The defendant led the police into the bedroom to show them the box and at that point the police observed in plain view a pair of sneakers which appeared to have blood on them. The defendant was placed under arrest. Id. at 677. The Court said that when the officer asked the defendant whether he owned a paint ball gun the incriminatory potential of the question was clear since evidence of paint ball use had been found at the scene of the crime. Id. at 679.

Finally the Appeals Court upheld the trial judge's finding suppressing a later statement which the defendant made at the police station. The statement was suppressed under Edwards v. Arizona, 451 U.S. 477 (1981), which held that the police may not reinitiate questioning after the defendant makes an unequivocal request for counsel. In this case after the defendant had been given Miranda warnings at the police station, the defendant said, "I don't think I want to talk to you anymore without a lawyer." Commonwealth v. Barros, 56 Mass. App. Ct. at 681. The police left the room but came back in a few minutes and told the defendant that he was being charged with murder. The defendant became upset; the police asked him if he wanted to talk and the defendant said he did. Id. at 677-78. The Court held that taken in context the defendant's statement was an unequivocal request for counsel and the police had no right to reinitiate questioning. Id. at 681.

ADMISSIONS AND CONFESSIONS: QUESTIONING JUVENILE; OPPORTUNITY TO CONSULT WITH ADULT; SOPHISTICATED JUVENILE

See Commonwealth v. Alfonzo A., 438 Mass. 372 (2003). (fifteen year old juvenile had no opportunity to consult with interested adult, so case returned to trial judge for additional findings on whether juvenile had high degree of sophistication etc.).

The Appeals Court was reversed in part. An interested parent must be present before a juvenile under fourteen can be questioned by the police. If the juvenile is fourteen or older he can waive this right but there must either be meaningful consultation with a parent, or the juvenile must demonstrate a "high degree of intelligence, experience, knowledge or sophistication" for the waiver to be valid. Id. at 380.

In the present case the defendant, who was fifteen, was questioned by police and said he did not want a parent or interested adult present, but there was no consultation between the defendant and an interested adult before he waived his right to have an interested adult present. Id. at 380, 382. The SJC said that in this situation the prosecution was required to show that the defendant had demonstrated a "high degree of intelligence, experience, knowledge or sophistication." Id. at 384. Since the trial judge had no made findings on this issue, the case was returned to the trial judge for such findings. Id. at 384-86. Although the Appeals Court had held that the record was insufficient to support a finding that the juvenile had this high degree of intelligence or sophistication, the SJC disagreed. Id. at 384. The SJC noted that the juvenile had been arrested twice in the past, once for armed robbery, and had exercised his right to silence as to some questions (he had refused to tell the police who his accomplices were), and, thus, there was a question as to his level of sophistication. Id. at 384-85.

APPELLATE PRACTICE: COMMONWEALTH APPEAL.

See Commonwealth v. Heiser, 56 Mass. App. Ct. 917, 918-919 (2002) (prosecution does not have to appeal a dismissal to preserve its rights unless the dismissal is with prejudice). See **dismissal,**

with prejudice for further discussion.

APPELLATE PRACTICE: FILED CONVICTIONS

See Commonwealth v. Prashaw, 57 Mass. App. Ct. 19 (2003) (under circumstances of case defendant could appeal filed convictions).

Normally the appellate courts do not hear appeals from convictions which have been placed on file. However, if a legal error affects both the filed and unfiled convictions, the Appeals Court may consider the filed convictions on appeal. That was the case here. The erroneously admitted photographs unfairly prejudiced the defendant on all charges, both filed and unfiled, so the Court reversed all charges. Id. at 27.

APPELLATE PRACTICE: MISSING TRANSCRIPT

See Commonwealth v. Kelly, 57 Mass. App.Ct. 201 (2003) (in case of a missing transcript attorneys are under a duty to attempt to reconstruct the record).

When a transcript is unavailable, a hearing should be held to attempt to reconstruct the proceedings. The attorneys involved in the trial are under an affirmative duty to see that a sufficient reconstruction is made if at all possible.

In this case, the defendant argued that a new trial should have been granted because missing portions of the trial record made the review of certain claims impossible. The Appeals Court rejected this argument on the ground that there was no evidence that appellate counsel or anyone else had filed a timely motion to reconstruct the record. Id. at 214.

COUNSEL: DUTY WHEN DEFENDANT INTENDS TO COMMIT PERJURY

See Commonwealth v. Mitchell, 438 Mass. 535 (2003) (lawyer's responsibility when he has a firm basis in objective fact for believing that his client intends to commit perjury).

Mass. R. Prof. C. 3.3(e), 426 Mass. 1383 (1998), governs the conduct of a lawyer who learns during the course of a trial that his client (the defendant) intends to commit perjury. The lawyer must try to dissuade the client, may not ask questions which would elicit perjury if the client testifies, and may not argue the probative value of the false testimony in his final argument. The rule has separate requirements if the issue arises prior to trial. Commonwealth v. Mitchell. 438 Mass. at 536 n.1. A lawyer cannot invoke this rule simply because the client has told inconsistent stories concerning the event, or, because of the Commonwealth's proof, the lawyer has serious concerns that the client may be lying. Id. at 545-46, 551. The lawyer must have a firm basis in objective fact to believe that his client intends to commit perjury.

The SJC held that counsel did have a firm basis in objective fact to believe that his client intended to commit perjury in this murder case. The client admitted to his counsel that he had killed the victims, and this confession was amply corroborated by the prosecution's evidence. Id. at 546. After the prosecution and the defense had rested, the defendant advised counsel that he wished to testify. Defense counsel, with the prosecutor present, approached the bench and advised the judge that his client wished to testify. He further advised the judge that he was concerned about committing a fraud upon the court, and it was his intention to ask the defendant his name and then allow the defendant to testify in narrative form. The judge agreed with this approach. Id. at 541-42. The defendant was allowed to testify and testified in narrative form. Counsel did not argue the defendant's testimony to the jury, but simply argued that the prosecution's case was defective. Id. at 542.

The SJC found that this approach was acceptable. The Court ruled that it was not

improper to have the prosecutor present during the bench conference since the prosecutor might have objected to the defendant testifying in narrative form if he had not known what was happening. Id. at 548. Although it may have been error not to have the defendant present at the bench conference, no prejudice to the defendant was shown. Id. at 547. The Court said that it was discretionary with the trial judge whether to have a colloquy with the defendant in this situation. Id. at 549.

COUNSEL: CONFLICT OF INTEREST

See Commonwealth v. Boateng, 438 Mass. 498 (2003) (defendant not prejudiced by counsel's dual representation of prosecution witness where defendant fully advised of potential conflict and conflict not actual because witness was not central to prosecution or defense case).

In this case, defense counsel not only represented the defendant but also represented the medical examiner in an unrelated civil case. Prior to trial both the defendant and the trial judge were advised of this fact and the judge conducted a colloquy with the defendant to ensure that he understood the situation. Id. at 509.

Both the trial judge and the SJC found that the conflict of interest was only potential and not actual. Id. at 510. The defense was insanity, and the medical examiner's testimony was not critical to the defense. In fact, many aspects of the medical examiner's testimony, including the ghastliness of the killing supported the defense theory of insanity. Id. at 512.

Defendant's appellate counsel argued that trial counsel should have presented expert testimony from another expert that the victim was killed by a single blow and this could have effected the jury's finding that the defendant was guilty of murder by extreme atrocity and cruelty. The SJC held, however, that even if the jury had found that death was due to a single blow they still could have found extreme atrocity and cruelty. Id. at 511.

COUNSEL: INEFFECTIVE ASSISTANCE

See Commonwealth v. Kelly, 57 Mass. App. Ct. 201 (2003) (**trial** judge rejects defense counsel's testimony that he gave client inaccurate advice).

The Appeals Court upheld the trial judge's denial of the defendant's motion for a new trial even though defense counsel testified on the motion for a new trial that he had misadvised his client that a statement suppressed under Miranda could not be used against him if he testified.

Prior to trial, the defendant's statements to the police were suppressed under Miranda. Commonwealth v. Kelly, 57 Mass. App. Ct. at 204. At trial the defendant testified and was impeached with the suppressed statements. Id. at 205-06. After his conviction, the defendant filed a motion for new trial. In his affidavits he asserted that his counsel had advised him that the suppressed statement could not be used against him if he testified. He asserted that if he had known that the statement could be used to impeach him he would not have testified. Id. at 207. The defense counsel was the only witness on the motion for a new trial and, in response to the leading question of appellate counsel, testified that the defendant's affidavit was accurate. Id. at 207.

The trial judge denied the motion for a new trial. He disbelieved defense counsel's testimony that he had misadvised his client and found as a fact that the defendant had made the decision to testify freely, intentionally and intelligently. Id. at 208. The Appeals Court upheld the trial judge's ruling, and found no ineffective assistance of counsel.

COUNSEL: INEFFECTIVE ASSISTANCE

See Commonwealth v. Walker, 438 Mass. 246 (2002) (SJC agrees with trial judge that counsel was adequate).

The defendant argued in a motion for new trial that his trial counsel had not adequately developed and commented on evidence which could have shown that the defendant's wife, and not the defendant, had committed the murder. The defendant claimed the evidence would have shown that his wife was enticed into the victim's apartment for sexual favors in exchange for cash and then shot the victim. The defendant's appellate counsel argued that trial counsel failed to introduce evidence that the victim had shown $1500 in cash to his three co-workers on the day of the murder, and the defendant had no way of knowing the victim had this money. He also argued that trial counsel had failed to bring out the comparative heights of the victim, defendant, and the defendant's wife, and the angle of the gunshot which killed the victim. Id. at 250-251.

The trial judge found in a memorandum denying the motion for new trial that trial counsel had pointedly accused the wife of killing the victim and emphasized her motive and opportunity to commit the crime. The SJC agreed that trial counsel had prepared and adequately executed a reasonable trial strategy. The evidence relied on by appellate counsel was no more likely than the evidence trial counsel emphasized to shift blame to another. Id. at 251.

CRIMES: ARSON; DIRECTED FINDING

See Commonwealth v. Lanagan, 56 Mass. App. Ct. 659 (2002) (directed finding denied).

Even though there was no expert opinion that fire had been deliberately set, the origin of the fire in a location where accidental causes had been eliminated tended to indicate an incendiary cause. Id. at 665. In addition the defendants had a financial motive for burning the house and had made a number of statements indicating that they had set the fire. Id. at 665-66.

Within a year before the fire the defendants had increased the maximum coverage on the house and increased the insurance on the contents. Id. at 660. They were behind in mortgage and car payments and unemployed with no prospect that they would be able to meet expenses. Id. at 660. The defendants told friends that they intended to build a log cabin where the house was and "were not sure what they were going to do to get rid of the house." The defendants had rented storage space where they had placed valuable items prior to the fire, and then afterwards made false statements that they had lost everything in the fire. Id. at 661.

One defendant said that she had been cooking stew on the stove and potatoes in the deep fat fryer when a horse ran away and she and her husband left to find it. Id. at 662. When they returned, the house was on fire. Id. at 662. The arson experts found little damage to the kitchen and no indication that the fire had started in the kitchen. Id. at 663. They determined that the fire had started in the basement, and, although the chemist could not detect the presence of an accelerant, the fire was consistent with the use of an accelerant. There was no evidence that the oil burner or tank or electrical panel in the cellar had accidentally set the fire. Id. at 663-64.

CRIMES: ASSAULT

See Commonwealth v. Chambers, 57 Mass. App. Ct. 47 (2003) (threatened battery type of assault requires apprehension on part of victim).

There are two types of assault: attempted battery and threatened battery. In case of attempted battery, the victim need not be aware of the hostile act. In case of a threatened battery, the defendant's intentionally menacing conduct must have reasonably caused the victim to fear imminent bodily injury. Id. at 48-49.

In this case the jury found the defendant guilty on four indictments for assault by means of

a dangerous weapon but did not specify whether an attempted battery or threatened battery was involved. The defense had preserved its rights by moving for a directed finding on all four indictments. Id. at 48. The Appeals Court vacated the judgment on two indictments and affirmed the judgment on two indictments. Id. at 53-54.

The facts indicated that the defendant had driven his car into another car containing four people. Id. at 52. Two of the four were aware of the other car and that it was coming towards them before it hit. A directed finding was denied as to the two indictments which alleged assaults on these two persons. The

other two occupants of the car were not aware of the other car before it struck, however. Directed findings were allowed as to the two indictments which alleged assaults on these two occupants. Id. at 52-53.

CRIMES: ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON.
See Commonwealth v. McIntosh, 56 Mass. App. Ct. 827 (2002) (defendant who punched a window pane was guilty of assault and battery by means of a dangerous weapon regardless of whether his actions were intentional or reckless).

A person is guilty of assault and battery if he intentionally assaults another and a touching occurs. He is guilty of reckless assault and battery only if the touching results in bodily injury. Id. at 832. It is not necessary for a person to wield a dangerous weapon to be guilty of assault and battery by means of a dangerous weapon. Id. at 831.

The defendant in this case was found guilty of assault and battery by means of a dangerous weapon on the theory that his act in putting his fist through a window pane was a reckless act which resulted in physical injury to two people behind the window pane who were cut by flying glass. Id. at 829-830. The Court rejected his argument that a window pane could not be a dangerous weapon if the act was merely reckless and there was no intentional assault and battery. Id. at 831-32.

CRIMES: ASSAULT AND BATTERY FOR PURPOSES OF COLLECTING A LOAN
See Commonwealth v. Thompson, 56 Mass. App. Ct. 710 (2002) (defendant had required guilty intent where victim was given drugs with understanding that he would reimburse supplier).

Giving a victim drugs with the understanding that he will sell the drugs and give the supplier the proceeds is a "loan" for purposes of the assault and battery for purposes of collecting a loan statute, G.L. c. 265, § 13C.

In this case "G" gave the victim drugs with the understanding that the victim would sell the drugs and give part of the proceeds to "G." The victim used the drugs, and did not turn any proceeds over to "G." "G" and the defendant confronted the victim about the money he owed "G" and D beat up the victim. The Court held that D was guilty of assault and battery for purposes of collecting a loan. Advancing a person property on the understanding that it will be paid for at a later date is a "loan" for purposes of the statute.

CRIMES: ASSAULT AND BATTERY, SELF-DEFENSE
See Commonwealth v. Galvin, 56 Mass. App. Ct. 698 (2002). See **defenses, self-defense** for discussion.

CRIMES: ASSAULT WITH INTENT TO MURDER
See Commonwealth v. Boateng, 438 Mass. 498 (2003) (mental illness can reduce assault with intent to murder to assault with intent to kill).

In an assault with intent to murder case, the intent to kill must be accompanied with malice and malice means without justification, excuse, or mitigation. Mitigation can mean adequate provocation, excessive force in self-defense or mental illness. Mental illness can be a mitigating factor which reduces assault with intent to murder to assault with intent to kill. Id. at 517-18.

In this case, the judge instructed the jury, without objection, that malice in the charge of assault with intent to murder had the same meaning as malice in the murder charge. Id. at 516-17.

This was error. The three prong definition of malice in a murder case does not apply to an assault with intent to murder case. Malice in the assault to murder context means justification, excuse, or mitigation. Id. at 517.

The defendant introduced extensive evidence of mental illness, and since the jury could have found this mental illness was a mitigating factor, there was a substantial risk of a miscarriage of justice on the assault with intent to murder indictment. Id. at 517.

CRIMES: BREAKING AND ENTERING A MOTOR VEHICLE WITH INTENT TO COMMIT A FELONY.

See Commonwealth v. Hill, 57 Mass. App. Ct. 240 (2003) (if the felony is larceny then the prosecution must prove that the defendant intended to steal more than $250; directed denied on this issue but case reversed for erroneous instructions).

This case was reversed under a miscarriage of justice standard because the judge advised the jury that as long as the defendant had intended to commit larceny in a motor vehicle then that larceny would be a felony. Id. at 248. The judge's instruction would have been correct if the defendant had been charged with breaking and entering a building with intent to commit a felony since larceny in a building is a felony. M.G.L. c. 266, § 20. But larceny in an automobile is not a felony unless the defendant steals over $250. Commonwealth v. Hill, 57 Mass. App. Ct. at 248 (Larceny in a "truck, truck-trailer unit, trailer, semi-trailer or freight container" is a felony. M.G.L. c. 266 § 20B).

In this case, the defendant broke into one car and stole a briefcase containing papers and then broke into another car and stole several bottles of wine and some personal items. No evidence was introduced as to the value of these items. Commonwealth v. Hill, 57 Mass. App. Ct. at 245-46. The Appeals Court denied the motion for a directed finding. A defendant need not steal property worth more than $250, as long as he intends to steal property worth this amount. Although the value of the items stolen is relevant on the issue of intent, it is not conclusive. Id. at 247.

CRIMES: BURGLARY, ARMED

See Commonwealth v. Berte, 57 Mass. App. Ct. 29 (2003) (home invasion committed with a firearm has a maximum sentence of twenty years and a minimum of ten).

Although armed home invasion committed with a weapon other than a firearm carries a sentencing range of twenty years to life, armed home invasion committed with a firearm carries a sentencing range of ten years to twenty years. Id. at 35. The Court states that although this seems to impose a lesser sentence for a crime which is "intuitively" more serious, the Court is bound by the language of the statute. Id. at 33. The Court also holds that the statute does not authorize probation or a suspended sentence. Id. at 33-34. See also **jury trial, waiver** for additional information on this case.

CRIMES: CONTROLLED SUBSTANCES, POSSESSION OF HYPODERMIC NEEDLE

See Commonwealth v. Landry, 438 Mass. 206 (2002) (person in needle exchange program may possess needle anywhere in Commonwealth).

The defendant was a participant in a needle exchange program in Cambridge. She was arrested in possession of a hypodermic needle in Lynn, which has no needle exchange program. Id. at 207. The Court held that a person in an approved needle exchange program may legally possess hypodermic needles obtained from the program throughout the Commonwealth. Id. at

208.

CRIMES: CONTROLLED SUBSTANCES, POSSESSION, DIRECTED
See Commonwealth v. James, 438 Mass. 1013 (2003) (Appeals Court decision directing a finding of not guilty on the ground that there was insufficient evidence of possession upheld)

CRIMES: DESTRUCTION OF PROPERTY, MALICIOUS
See Commonwealth v. DeBerry, 57 Mass. App. Ct. 93 (2003) (felony requires proof value exceeded $250, but value determined by value of property not value of damage).

The felony offense of malicious destruction of property requires proof that the damaged property had a value in excess of $250. This is an element of the offense which must be proved to a jury beyond a reasonable doubt.

In Commonwealth v. Pyburn, 26 Mass. App. Ct. 967 (1988), the Appeals Court said that value was to be determined not by the cost of repairs but by the value of the property damaged. Commonwealth v. DeBerry, 57 Mass. App. Ct. at 95. The Pyburn case involved a truck which the defendant had damaged with a fork lift, and the entire body of the truck was damaged. The Appeals Court has said that a different case might be presented if a person broke a window in a vehicle or building, since the window is a separable and distinct part of the vehicle or building. Commonwealth v. DeBerry, 57 Mass. App. Ct. at 96.

In this case the defendant punched a hole in the wall of a building. The Appeals Court holds that value should be determined by the value of the entire building since the wall was not a separable part of the building. Id. at 97-98.

CRIMES: DESTRUCTION OF PROPERTY, WANTON
See Commonwealth v. Faherty, 57 Mass. App. Ct. 150 (2003) (directed finding denied; interference with inner workings of a parking meter was wanton destruction even though it only took a few minutes to fix).

The defendant in this case placed two pennies wrapped in paper in a parking meter which only took quarters. This caused the parking meter to register "out of order." It took the police "several minutes" to fix the parking meter and make it operable. Id. at 151-52.

Wanton injury means the intentional doing of an act with the awareness of the probability that the act with result in substantial damage. Id. at 153. Here the parking meter was substantially harmed because it was put out of order. The fact that the injury was short lived or easy to fix was simply a "matter of luck." Id. at 153-54.

CRIMES: FIREARMS
See Commonwealth v. Sayers, 438 Mass. 238 (2002) (adult carrying a BB gun on school or university grounds is guilty of an offense even though he does not need a license to carry a BB gun elsewhere).

The defendants were charged with carrying a firearm on university property in violation of G.L. c. 269 §10(j), and moved to dismiss on the ground that the gun was a BB gun. The SJC held that a BB gun is a firearm for purposes of this particular statute because G.L. c. 269 §10(j), defines a firearm as a rifle or pistol from which a "shot, bullet, or pellet" can be discharged. This is a broader definition than that contained in the G.L. c. 269 §10 (a), which prohibits carrying a firearm without a license, and defines a firearm as a weapon from which a "shot or bullet" can be discharged. An adult can possess or carry a BB gun (outside university property) without a

license because a BB gun is not a firearm for purposes of 10(a).

Under G.L. c. 140, §10(j), even a person who has a license may not carry a firearm of any kind on school or university property "without written authorization of the board or officer in charge." Commonwealth v. Sayers, 438 Mass. at 240.

CRIMES: FRAUD, INSURANCE

See Commonwealth v. Jerome, 56 Mass. App. Ct. 726 (2002) (directed granted in insurance fraud case; evidence insufficient to prove fraudulent intent).

The defendant was a lawyer who represented a driving instructor who filed nine separate claims for automobile injuries between April, 1990, and January, 1994. Id. at 727. The defendant was charged with knowingly filing false documents in support of a November 2, 1993, claim with the intent to defraud the insurance company. Id. at 726, 732. The Court rejected the theory that the defendant had intended to mislead the insurance company into thinking his client had not had any prior accidents. Id. at 733-34. The defendant submitted a medical record which contained a notation that the patient reported no prior medical history. But the defendant also submitted a report from a chiropractor which stated that the defendant had recovered from a prior motor vehicle accident. Id. at 734. Thus, the evidence was insufficient to show a fraudulent intent, and a directed finding was granted.

CRIMES: LARCENY, MOTOR VEHICLE

See Commonwealth v. Gonsalves, 56 Mass. App. Ct. 506 (2002) (an all terrain vehicle (ATV) is motor vehicle for purposes stolen motor vehicle statute; directed denied).

An ATV, an all-terrain vehicle used for off road recreation is a motor vehicle for purposes of stolen motor vehicle statute (even though it is not a "motor vehicle" for purposes of the motor vehicle registration statute). Id. at 508-09.

The Court says that possession of a stolen motor vehicle with an altered VIN is not sufficient by itself to convict, but here there was additional evidence. Id. at 511. The defendant initially denied any knowledge of an ATV when questioned by police, and later was observed unfastening lock attached to one of the rear tires of the ATV. The defendant then ran when the police approached. Id. at 510-11. See **jury, instructions, presumptions** for additional discussion.

CRIMES: MOTOR VEHICLE OFFENSE; IDENTITY OF OPERATOR

See Commonwealth v. Cromwell, 56 Mass. App. Ct. 436 (2002) (directed denied; evidence sufficient to prove defendant driver of car).

The defendant was the owner of a car involved in a collision. He was present at the scene of the collision and "was shaking all over, like most people involved in accidents." The defendant gave the police his license and registration and performed field sobriety tests, thus tacitly admitting that he was the operator. None of the bystanders reacted when the police treated the defendant as the operator, and there was an absence of evidence suggesting that someone other than the defendant was the operator. Id. at 439.

CRIMES: MOTOR VEHICLE OFFENSE; IDENTITY OF OPERATOR

See Commonwealth v. Platt, 57 Mass. App. Ct. 264 (2003), further appellate review **granted** 439 Mass. 1101 (directed granted; evidence insufficient to prove defendant was driver of car).

The defendant was charged with leaving the scene after causing property damage. The

defendant's car was involved in an accident approximately one-half to three quarters of a mile from his house. Id. at 265. The accident occurred at approximately 12:15 a.m., June 21, and there were no witnesses as to who was driving. Id. at 265. At approximately 6 a.m., June 21, the defendant called the police and reported that his car had been stolen at about 12:15 a.m., while he was in a store (whose name he could not remember) on Center Street in Brockton. Id. at 265. He later told the insurance company that he and his girl friend had gone to the store to get food. They had an argument; and the girl friend jumped out of the car. The defendant stopped the car, left the keys in the car, and ran after her. When he returned, the car was gone. Id. at 266.

The Court held that even if one disbelieved the defendant's version of what had happened, this did not constitute evidence that he was the driver. Id. at 270. The fact that he admitted to driving the car about the time the accident occurred was also insufficient. Id. at 270.
Thus, a directed finding had to be granted.

CRIMES: MOTOR VEHICLE OFFENSE, CITATION
See Commonwealth v. Moulton, 56 Mass. App. Ct. 682 (2002). See **defenses, citation** for discussion**.**

CRIMES: MURDER, MANSLAUGHTER, INVOLUNTARY, ACCIDENT
See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641 (2002) (in involuntary manslaughter case defendant is not entitled to an instruction on accident unless there is evidence from which a jury could conclude that the defendant's acts were not only unintentional but were not wanton or reckless).

The defendant in this case was convicted of involuntary manslaughter on a joint venture theory. On appeal he argued that the judge should have instructed the jury on accident. Id. at 647. The Appeals Court rejected this argument on the ground that no reasonable jury could have found that the actions of the co-defendant, who fired the fatal shots, were not wanton and reckless.

The Appeals Court found that, viewing the evidence in the light most favorable to the defendant, a jury could find that the co-defendant pulled a loaded revolver out of his pocket and, while holding his finger on the trigger, threw a punch at the victim. The Court held that no reasonable person could possibly conclude that such an extraordinarily dangerous act was not wanton and reckless. Id. at 650-51.

CRIMES: MURDER; FELONY-MURDER AND CAUSATION
See Commonwealth v. Brum, 458 Mass. 103, 120 (2002) (felony must be causally related to the homicide; no felony murder if the felony occurs as an afterthought to the homicide).

In this case, the SJC said that if the defendant stole the victim's wallet as an afterthought after assaulting and killing the victim, then there would be no felony murder.

The defendant was convicted of felony murder in the first degree with armed robbery being the predicate felony. The defendant admitted to grabbing the victim in a headlock, choking him, and throwing him to the floor. The defendant said that he believed victim was dead before he hit the floor. The defendant stated that the victim's wallet had popped out of his pocket, and he, the defendant, had picked it up off the floor after the victim hit the floor. Id. at 108. The defendant argued that the judge should have charged on felony-murder in the second degree with larceny from the person as the predicate felony because the jury could have found that the defendant committed larceny rather than robbery on the theory that the defendant took the victim's wallet as an afterthought after the assault and homicide. Id. at 119-120.

The SJC said, however, that if the defendant had picked up the wallet and committed larceny as an afterthought to the homicide then there was no felony-murder because there was no casual connection between the felony and the homicide. Id. at 120.

CRIMES: MURDER; FELONY-MURDER AND MERGER

See Commonwealth v. Kilburn, 438 Mass. 356 (2003) (in felony- murder case the felony must be separate from the murder).

In a felony-murder case, the acts which constitute the felony must be separate from the acts of violence which constitute a necessary part of the murder. Id. at 359. Where armed assault in a dwelling is the underlying felony then a merger of the two offenses occurs when the act which constituted the assault was the same act which constituted the homicide. Id. at 359.

In this case there were two separate assaults. When the victim opened the door, the defendant pointed a gun at him and pushed him backward. A short time later the defendant shot the victim in the head and killed him. Id. at 359.

It was prejudicial error for the judge to fail to instruct the jury that they must find the defendant guilty of the first assault to find him guilty of felony-murder. Id. at 361. Since the defendant failed to object; however, the error was waived, and the SJC found no substantial risk of a miscarriage of justice on the facts of the case (see **post conviction remedies, postappeal motion for new trial** for further discussion). Id. at 360, 363.

CRIMES: MURDER, MANSLAUGHTER, ADEQUATE PROVOCATION

See Commonwealth v. Vatcher, 438 Mass. 584 (2003) (evidence was insufficient to show adequate provocation, so an instruction on voluntary manslaughter was not warranted).

The evidence in this case was insufficient to show adequate provocation and, thus, no instruction of voluntary manslaughter was required .Id. at 587. A defendant's actions must have been both objectively and subjectively reasonable in the sense that a reasonable person would have become sufficiently provoked and would not have cooled off by the time of the homicide. Id. at 587-88. A victim's use of physical force against a defendant will not necessarily constitute adequate provocation, especially, as here, where the confrontation is between an adult and a child. Id. at 589.

The victim in this case was the defendant's eleven year old son, who suffered from a number of physical and mental disorders. Id. at 585. On the day of the murder, the victim kicked the defendant, hit him with an afghan, got into a wrestling match with the defendant, kicked a brass planter, and tried to destroy his mother's birthday cards. Id. at 588. The Court held that this was not adequate provocation.

CRIMES: PORNOGRAPHY

See Commonwealth v. Perry, 438 Mass. 282 (2002) ("visual material" in child pornography statute encompasses computer images where actual children were used).

The child pornography, G.L. c. 272, §31, statute which prohibits dissemination of visual images of a child in a state of nudity includes computer images of actual children. A photograph of a child which is taken by a digital camera and stored in a computer is a "visual image" for purposes of the statute. The Court said that the bytes in a computer can be likened to conventional negatives, and the statute covers such negatives even if undeveloped. Commonwealth v. Perry, 438 Mass. at 285-86.

The images in the defendant's computer were either conventional photographs scanned into the computer or images taken with a digital camera. Id. at 286 n. 4. They were not "virtual child pornography" which does not involve pictures of real people, and which a state may not constitutionally prohibit, unless they are "obscene." Attorney General v. Free Speech Coalition, 122 S.Ct. 1389 (2002).

CRIMES: RAPE, AGGRAVATED

See Commonwealth v. McCourt,438 Mass. 486 (2003) (Kickery overruled; the aggravating factor can occur after the rape).

Where the defendant beat and injured the victim after the rape, he was still guilty of aggravated rape. Commonwealth v. McCourt, 438 Mass. at 492, 497. The rape and the aggravating factor must constitute one continuous episode and course of conduct but the aggravating factor need not occur before the rape. Id. at 496. The Court overrules the Appeals Court decision in Commonwealth v. Kickery, 31 Mass. App. Ct. 720 (1991), which held that a person was not guilty of aggravated rape if the kidnaping occurred after the rape. Commonwealth v. McCourt, 438 Mass.. at 496 n. 12.

CRIMES: RAPE; CONSENT AND ALCOHOL

See Commonwealth v. Molle, 56 Mass. App. Ct. 621 (2002) (evidence insufficient to justify instruction on effect of alcohol on victim's ability to consent; instruction given was inaccurate, but there was no miscarriage of justice).

It is only when a victim in a rape case is "wholly insensible" that she is incapable of consenting, and any instruction on the effect of alcohol on a victim's ability to consent should use this language. Id. at 626-27. Here, there was no evidence that the victim's will was substantially impaired. Thus, no instruction on the effect of alcohol on a victim's ability to consent should have been given. The victim testified that she had two or three drinks but she was not affected by these drinks, and other witnesses testified that she did not appear intoxicated. Id. at 626.

Furthermore, the instruction given was inaccurate. The judge instructed the jury that if the victim was restrained from exercising her will because of the use of alcohol, then there could be no consent. He should have used the "wholly insensible" language. Id. at 626-27.

The Court said, however, over two dissents, that there was no miscarriage of justice since the defendant did not object to the instruction and the evidence against him was strong. Id. at 627-29.

DEFENSES: SELF-DEFENSE; DEFENSE OF PROPERTY

See Commonwealth v. Galvin, 56 Mass. App. Ct. 698 (2002) (Failure to give instruction on self-defense when defense was raised by evidence results in reversal for a miscarriage of justice).

A self-defense instruction is required if raised by the prosecution's case, the defendant's case, or the two in combination. Id. at 699. In this case, the combined testimony raised a reasonable doubt whether the defendant had a reasonable concern for her safety and no ability to retreat. Thus, a self-defense instruction was required, and, because none was given, the case was reversed even though no objection was taken.

The defendant (who was separated from her husband) testified that as she was walking towards her husband's quarters she was grabbed by her husband's landlord and the last thing she remembered before blacking out was the landlord pushing her face into the ground. She testified that at no time was she told to leave the premises. Id. at 700.

The landlord testified that the defendant refused to leave the premises after he had told her to leave. She was four feet inside the house when he grabbed her arm to remove her from the property. She responded by clawing and scratching him. Id. at 700.

The judge not only failed to instruct on self-defense, but he also told the jury that a property owner may use reasonable force to remove a trespasser from the premises if the trespasser has been told to leave the property and has refused. He told the jury that a trespasser was someone who had no right to be on the property and who had been told to leave by the property owner. Id. at 701-02. The Appeals Court also found fault with this instruction because it assumed that the defendant was a trespasser. The Court said it is normally for the jury to decide whether a person has a right to be on the property and is a trespasser, and the judge should instruct the jury on when a person has a right to be on certain property. Id. at 702-03. The defendant had testified that she had come to drop off her husband's mail. There was also testimony that the defendant had been a frequent visitor at the landlord's house before separating from her husband. Id. at 701.

DEFENSE: CITATION DEFENSE IN MOTOR VEHICLE OFFENSE

See Commonwealth v. Moulton, 56 Mass. App. Ct. 682 (2002) (failure to give defendant a citation at the scene of the accident did not result in dismissal because the officer had not completed his investigation until he interviewed the defendant at the hospital).

Failure to give a motor vehicle offender a citation at the time and place of the offense is a defense under G.L. c. 90C, §2, unless "additional time was reasonably necessary to determine the nature of the violation...or where the court finds that a circumstance not inconsistent with the purpose of this section...justifies the failure." The trial judge in the present case dismissed the complaint, but the Appeals Court, with Judge Greenberg dissenting, reversed. Commonwealth v. Moulton, 56 Mass. App. Ct. at 685-86. The Court said that, although the officer had formed an opinion that the defendant was under the influence at the scene of the accident, the defendant was almost immediately transferred to the hospital, and the officer did not complete his investigation until he had interviewed the defendant at the hospital. Id. at 684. At the hospital, the officer advised the defendant that he would be mailing her a citation for driving under the influence, and he promptly did so. Id. at 683. The Appeals Court said that the investigation was not complete until the officer had interviewed the defendant at the hospital. Furthermore, the basic purpose of the statute, to prevent corrupt practices and to give prompt notice to the defendant, had been carried out. Id. at 685.

DISCOVERY: BISHOP

See Commonwealth v. Oliveira, 438 Mass. 325 (Non-privileged records summonsed under Bishop should be turned over to defense counsel without any determination of relevancy by the motion judge; social worker and psychotherapist privilege must be asserted by the patient).

Both the statutory psychotherapist-patient privilege and the social worker-patient privilege must be asserted by the patient. Id. at 330-331. (This is not true of the rape counselor privilege Id. at 331 n. 7) . The judge may not assert the privilege for the patient. If records summonsed into court under Bishop are not privileged or if no privilege has been asserted, then the records must

be turned over to the defense without any determination of relevancy by the judge. Id. at 338.

It is true, of course, that before records are summonsed into court under Bishop, the defendant must show that the records are "likely to be relevant" to some issue in the case. This means that a sufficient likelihood exists that the requested documents contain some information that is material and relevant. Id. at 339-340. Much of the material in the summonsed documents may be irrelevant, but it is for counsel, not the judge, to make this determination. Id. at 340-41.

The issue in this case arose on a motion for new trial. Appellate counsel argued that the trial counsel was ineffective because he had not summonsed into court certain records, which met the "likely to be relevant" standard. In order to determine whether the defendant had been prejudiced by this failure, the SJC ordered the case remanded to the trial judge so he could examine the records. Id. at 327.

On remand, the defense counsel argued that the motion judge should first determine whether the records were privileged. The motion judge ruled that even though a record was not privileged he would not give defense counsel access to this record unless he found it to be relevant. In addition, although no privilege had actually been asserted, he would determine from an examination of the records which portions were privileged. Id. at 327-28. He found that three hospital records were not privileged. He allowed the defense to examine one of these records because he found it was relevant, but denied defense counsel access to the other two on the ground that they were irrelevant. Id. at 328. He found that a record from a mental health center was privileged and only allowed the defense access to a portion of the records, which he determined to be relevant. Id. at 328-29.

The SJC reversed. It held that if records summonsed into court under Bishop are not privileged or if no privilege has been asserted by the patient then they must be turned over to the defense without any determination of relevancy by the trial judge. Id. at 338. The Court pointed out that as a practical matter a judge often cannot know from a bare examination of the records whether a statement made to a given person was made to a psychotherapist or social worker. An assertion by the patient is needed to show that the statement was, in fact, made to one of these individuals. Id. at 333-334.

DISCOVERY: LATE DISCLOSURE POTENTIALLY EXCULPATORY EVIDENCE. See Commonwealth v. Castro, 438 mass. 160 (2002) (defendant unable to show prejudice from the late disclosure of a potential witness).

Under the Federal Constitution, exculpatory evidence is not considered material unless "it creates a reasonable doubt that did not otherwise exist." In Massachusetts, if the defendant makes a specific request for exculpatory evidence, the evidence is deemed material if it provides a "substantial basis" for claiming that materiality exists. In this case, there was a specific request for the statements of witnesses which was not complied with until two weeks before trial when the defense was provided with a police report which contained the statements of a potential witness. Id. at 168.

The SJC held, however, that it was a matter of speculation whether the prompt disclosure of the police report concerning the potential witness would have aided the defense. It was speculative whether prompt disclosure would have allowed the defense to locate the witness and, if located, whether here testimony would have aided the defense. Id. at 168-69. Thus, the defendant was not entitled to a new trial.

In this murder and assault with intent to murder case, the surviving victim testified that earlier in the evening the defendant had tried to force his way into the victim's apartment and had

gotten into a fight with two of her friends. At this time, the defendant's beige-gold Honda Accord was observed at the scene. Id. at 162. Later the victim testified that the defendant knocked on her window, fired a shot which hit her in the chest, and three other shots, one of which killed the other victim, who was inside her apartment. Id. at 163.

On the day of the shooting, the police interviewed a neighbor who said that she had seen two men get out of a blue car, heard four shots fired, and then saw the two men, one of whom had a gun, get back in the car. The neighbor told the police she wanted to remain anonymous. Id. at 166.

Two weeks before trial, the police report containing these statements was brought to the attention of the prosecutor, who immediately sent a copy to the defense attorney, who unsuccessfully sought a continuance. Id. at 166-67.

On the day before trial, the judge conducted a voir dire of the officer who had interviewed the witness. The officer testified that the prosecutor had asked him to find the witness, and he had learned her name was Tina, and that she had moved to the Academy Homes Development two years before. The defense again requested a continuance, which was denied. Id. at 167.

After the prosecution rested, the defense advised the judge that he had learned Tina's full name but had been unable to locate her. The judge denied a motion for a mistrial. After the defendant was convicted, the defendant's motion for a new trial was denied. Id. at 167.

The SJC said the defense had failed to show any adverse consequences from the late disclosure. No evidence had been presented that Tina would be available to testify at a new trial. Id. at 168-69. The Court pointed out that the two men Tina saw were Hispanic and the defendant was Hispanic. Although the defendant was seen driving a beige Honda Accord the night of the murder, he also drove a blue car to make deliveries for his employer. Id. at 168 n. 6.

DISMISSAL: WITH PREJUDICE

See Commonwealth v. Heiser, 56 Mass. App. Ct. 917 (2002) (prosecution does not have to appeal a dismissal to preserve its rights unless the dismissal is with prejudice, and such a dismissal should only be granted for egregious misconduct by the prosecution or a serious threat of prejudice to the defendant).

In this case, the first set of complaints against the defendants was dismissed by a District Court judge because the police failed to appear for trial. The prosecution then refiled the complaints but the judge refused to hear them and told the prosecution that they would have to indict the defendants in the Superior Court. Id. at 917-18.

The Appeals Court held that the prosecution could appeal the second dismissal even though they had. failed to appeal the first dismissal. The Court said that there was nothing to indicate that the first dismissal was with prejudice. Id. at 918-919. The second dismissal was, in effect, a dismissal with prejudice so the prosecution could appeal.

Dismissal with prejudice is only warranted in case of "egregious misconduct" by the prosecution or "a serious threat of prejudice" to the defendant. Such a dismissal would not be warranted simply because a police officer failed to appear for trial. Furthermore, in case of a dismissal with prejudice, the judge should hold a hearing and make the findings required by Brandano. Id. at 918.

The cases could not be bound over to the Superior Court without a probable cause hearing and none was held in this case. Id. at 918.

Thus, the judge had no authority to prevent the prosecution from refiling the complaints.

DOUBLE JEOPARDY: DEATH PENALTY

See Sattazahn v. Pennsylvania, 123 S.Ct. 732 (2003) (since imposition of death penalty was an element of the offense of aggravated murder in Pennsylvania, double jeopardy only applies if a jury makes a finding rejecting the death penalty)

The Supreme Court reiterated its holding in Apprendi v. New Jersey that if the existence of a fact (other than a prior conviction) increases the maximum sentence for an offense, then this fact must be found beyond a reasonable doubt by a jury. This principle was applied in Ring v. Arizona, which held that an aggravating circumstance which authorizes the imposition of the death penalty is an element of the offense. The same reasoning applies in double jeopardy cases. Unless a jury acquits at the death penalty phase, the defendant can be retried, and the death penalty may be imposed.

In the defendant's first trial, the defendant was convicted of first degree murder but the jury was unable to agree on whether to impose the death penalty. Under Pennsylvania law, a judge was required to impose a sentence of life imprisonment when a jury was unable to agree at the sentencing phase. Because of this statute, the trial judge imposed a life sentence.

The defendant's case was reversed on appeal, and he was tried for murder a second time. This time he was not only convicted of murder but the jury also imposed the death penalty. The Supreme Court held that, since the jury had failed to acquit the defendant at the death penalty phase of the first trial, double jeopardy did not attach to the death penalty.

EVIDENCE: AUTHENTICATION OF PHOTOS
See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641 (2002) (on ruling on authentication of photos, the trial judge was not bound by the rules of evidence but could consider an affidavit filed by a defendant on a motion to suppress). See **evidence, ruling on admissibility by judge.**

EVIDENCE: AUTHENTICATION OF PHOTOS; BAD ACTS OF DEFENDANT
See Commonwealth v. Prashaw, 57 Mass. App. Ct. 19 (2003) (conviction reversed because judge exceeded his discretion in admitting photograph whose minimal probative value was greatly outweighed by its prejudicial effect).

The Appeals Court said that this was one of those rare cases in which the trial judge had exceeded his wide discretion to admit photographs. Id. at 20, 22. To be admissible a photograph must be properly authenticated as being accurate and have enough similarity to the circumstances at the time of the dispute to be helpful to the jury. Id. at 25.

The police in this case seized from the defendant's bedroom some drugs and drug paraphernalia and several photographs of the defendant in the nude in sexually provocative poses. Id. at 21-22. The defendant conceded that the bedroom was hers, id. at 23, but the evidence indicated that she had been away for five days before the search, and her alcoholic husband may have used the bedroom for parties while she was away. Id. at 24.

There was nothing about the photographs which indicated when they were taken or that they were taken in the bedroom. Id. at 25. Since the probative value of the photographs was minimal and the risk of prejudice to the defendant was great, the cases were reversed. Id. at 26.

EVIDENCE: BAD ACTS OF DEFENDANT; USE OF ALIAS
See Commonwealth v. Martin, 57 Mass. App. Ct. 272 (2003) (repeated reference by prosecution to the defendant's use of an alias results in reversal under miscarriage of justice standard).

The defendant filed a motion in limine prior to trial to exclude his alias. The motion was denied, id. at 274, and the prosecutor repeatedly referred to the defendant's alias during the trial without objection from the defendant. The Court held that when a motion in limine is denied prior to trial and the defendant fails to object at trial then the case will not be reversed unless there was a substantial risk of a miscarriage of justice. Id. at 275. Here there was such a risk.

Here the alias was not admissible to establish identity and had no relevancy. Id. at 275. Nevertheless, the prosecutor referred to the alias in his opening, in his cross-examination of the defendant, and in his closing. In his closing he said, "How can you trust somebody who has two names at the outset?" Id. at 275. The Court said that this was clearly an improper use of the alias evidence, and since the evidence was not overwhelming the case had to be reversed as to both the defendant and co-defendant. No drugs were found on the defendants, although the defendant had a pager and $158 in cash on his person. Id. at 276. The case was a classic match of credibility between the defendants and the police, and, since the credibility of the defendant with the alias was critical to both cases, both cases had to be reversed. Id. at 276-77.

EVIDENCE: CONSISTENT STATEMENTS; FRESH COMPLAINT
See Commonwealth v. Williams, 56 Mass. App. Ct. 337 (2002) (prior statement made after inconsistent statements admitted to show complainant did not puff up initial claim prior to trial; multiple fresh complaint OK).

The complainant in this case called the police a few minutes after the alleged rape. The prosecution introduced evidence of the 911 call, the statement the complainant gave to the police

at the scene, statements she gave to police and nurse at hospital as fresh complaint. The defendant brought out inconsistencies between these statements and the complainant's trial testimony. The prosecution was then

allowed to put in evidence a statement the complainant made to the police ten days later on the theory that it was a prior consistent statement because it was consistent with her trial testimony. Id. at 340-41, 342-43.

The Appeals Court recognized that prior consistent statements are not admissible unless made before the motive to falsify occurs and in this case the defendant claimed the motive occurred when the complainant first spoke to the police. The Court said, however, that the trial judge has broad discretion to admit such evidence, and here the evidence was admissible to show that the complainant had not puffed up her initial claims of the eve of trial or tried to smooth over some of the rough parts. Id. at 344.

The Court said that the introduction of multiple fresh complaints was not prejudicial since they could be used to rebut defense argument concerning inconsistencies and that complainant had not complained to everyone she saw. Id. at 345-46.

EVIDENCE: CONSISTENT STATEMENT

See Commonwealth v. Gaudette, 56 Mass. App. Ct. 494 (2002 (judge in discretion could exclude prior consistent statement offered by the defendant on the ground that statement was not made before a motive to falsify existed).

The victim testified that he had an altercation with the defendant's son, and shortly thereafter the defendant drove by in a truck and fired several shots at the victim's house. Id. at 496. The defendant's son testified that he and not the defendant was driving the truck and fired the shots. Id. 497-98.

The defense attempted to introduce a statement which the son had made to a friend shortly after the shooting and before the defendant's arrest. The defense argued that, since the statement was made before the defendant's arrest, it was made before the existence of a motive to falsify. Id. at 500.

The Appeals Court ruled that the judge in his discretion could have found that the defendant's son had a motive to falsify at the time the statement was made because the son was aware of the events of the day and would have had a motive to falsify simply from his relationship with his father. Id. at 500.

EVIDENCE: CROSS-EXAMINATION; PENDING CASES

See Commonwealth v. Castro, 438 Mass. 163, 173-74 (2002) (judge in his discretion may exclude pending federal charges where there is no evidence the witness will get or expects to get a break on federal charges).

The SJC ruled that the trial judge in his discretion could exclude any mention of a prosecution witness's pending federal charges in his state court trial where there was no evidence he would get or expected to get any consideration from the federal authorities for his state court testimony. On voir dire, the witness testified that he did not expect to be released from federal custody because of his testimony in state court. The witness testified and the prosecutor represented that there had been no communication between them and the federal authorities. Id. at 174.

EVIDENCE: CROSS-EXAMINATION; PENDING CASES

See Commonwealth v. Walker, 438 Mass. 246, 253 (2002) (exclusion of fact witness was avoiding a possible life sentence by cooperating with prosecution OK where defendant able to show she was avoiding murder and robbery charge by cooperating).

On cross-examination the defendant was allowed to ask a witness if she knew she could face charges of murder and robbery if she had played a more active role in the killing, and that by agreeing to testify for the prosecution she was avoiding all criminal liability. He was not allowed to ask if she was avoiding potential life sentences for murder in the first degree and armed robbery. The Court held that the trial judge in his discretion could exclude this last question since the jury knew from the other questions asked that the witness had a strong motive to lie.

EVIDENCE: CROSS-EXAMINATION; PRIOR CONVICTIONS

See Commonwealth v. Eugene, 438 Mass. 343 (2003) (on impeachment by prior conviction the sentence should not be read to the jury).

The SJC says that when a witness is impeached by a prior conviction the fact of conviction and the nature of the crime committed are the only facts which should be considered on the issue of credibility. Id. at 352. The sentence should not be read to the jury except possibly if the witness denies the conviction or equivocates on whether he was convicted. Id. at 352 n. 7.

In the present case, the defendant impeached a prosecution witness with prior convictions for armed robbery, battery, and burglary, but was not allowed to read that the witness was sentenced to fifteen years on these convictions. Id. at 352.

EVIDENCE: CROSS-EXAMINATION; IDENTIFICATION PROCEDURE

See Commonwealth v. Vardinski, 438 Mass. 444 (2003) (defendant has a right to ask identifying witness if identification was bolstered by being shown a photo [after initial identification] which noted that the defendant had been arrested in the past).

The SJC holds that the judge unconstitutionally restricted the defendant's right to cross-examine concerning the integrity and fairness of the identification process by sanitizing the photo which the identifying witness was shown and preventing cross-examination on the fact that the photo showed that the defendant had been previously arrested. Id. at 447-48, 451-52.

The defendant was charged with robbery and the victim identified a photograph of the defendant as his attacker. Nothing on this photograph indicated that the defendant had a prior arrest. After the identification had been made the police had the victim sign a photograph which indicated that the defendant had been previously convicted of illegal possession of a firearm. Id. at 446-47.

At trial the judge, over the defendant's objection, redacted the photo which the victim signed so it did not show the defendant had been previously arrested. The judge also prevented cross-examination as to whether the victim had signed a photo which mentioned the defendant's prior arrest. Id. at 447-48. The SJC held that this unconstitutionally restricted the defendant's right to cross-examine concerning the integrity and fairness of the identification process.

EVIDENCE: CROSS-EXAMINATION; RAPE-SHIELD STATUTE

See Commonwealth v. Cortez, 438 Mass. 123, 129-130 (2002) (defendant must file written motion in order to cross on evidence of other causes for victim's physical condition).

Under the rape-shield statute, G.L. c. 233, § 21B, evidence of the victim's sexual conduct is inadmissible unless it is the cause of a physical condition of the victim. Commonwealth v. Cortez, 438 Mass. at 129. If a defendant wishes to admit evidence under this exception, he must file a written motion and an offer of proof, and the judge must conduct an in camera hearing. Here, the defendant failed to file such a motion. Furthermore the judge correctly ruled that evidence that the murder victim had sexual intercourse with her boyfriend two days earlier did not explain her physical injuries. Id. at 129-130.

The medical examiner testified that the victim had suffered bruises and abrasions on her inner thighs and mons region of her genitalia. Id. at 129. The defense did not file a motion but tried to show through cross-examination that the victim had intercourse with her boyfriend two days earlier. Id. at 129. The SJC held that since the undisputed evidence was that the injuries were fresh the judge properly ruled that the intercourse two days earlier could not have caused these injuries. Id. at 129-130.

EVIDENCE: DEFENDANT EXERCISES RIGHT TO SILENCE

See Commonwealth v. Brum, 438 Mass. 103 (2002). (error for the prosecution to introduce evidence that the defendant invoked his right to remain silent).

In this case, the defendant failed to object to police testimony that the defendant had twice told the police that he did not wish to answer any more questions. The SJC held that this was error, but there was no substantial risk of a miscarriage of justice. Id. at 120-121.

EVIDENCE: DEFENDANT'S STATEMENTS, VERBAL COMPLETENESS

See Commonwealth v. Eugene, 438 Mass. 343 (2003) (when prosecution introduces portion of defendant's statement, the defendant may introduce additional portions only if they are necessary to understand the portions introduced).

A statement of a defendant when offered by the defendant to prove the truth of the statement is inadmissible hearsay. Id. at 350. If one party introduces a portion of a statement, then the other party may introduce other portions of the statement only if they relate to the same subject as the admitted statement and are necessary to an understanding of the admitted statement. Id. at 350-51. The purpose of this doctrine of verbal completeness is to prevent one party from presenting a misleading version of a statement by omitting portions which would clarify or put in context the part introduced.

In this case the prosecution introduced a portion of a statement which the defendant had made to the police. In this portion of the statement, the defendant said that he had passed out after drinking and had awoken to find the victim dead. The defense attempted to introduce other portions of the statement in which the defendant had stated that he had found the victim and her new boyfriend in bed ten days earlier. Id. at 351. The Court said that the portion of the statement which described what had happened ten days before the homicide was not necessary to understand the portion of the statement which the prosecution introduced and which was limited to a description of the events on the day of the homicide. Id. at 351.

EVIDENCE: DEFENDANT'S STATEMENTS, VOLUNTARINESS HEARING

See Commonwealth v. Boateng, 438 Mass. 498 (2003) (judge is required, sua sponte, to conduct a hearing on voluntariness of defendant's statements whenever voluntariness is an issue). See **Incompetent defendant: right to hearing on competency, voluntariness of statements and Postconviction remedies, pre-appeal motion for new trial** for further discussion.

EVIDENCE: EXPERT TESTIMONY OF POLICE OFFICER

See Commonwealth v. Cortez, 438 Mass. 123, 127-28 (2002) (police officer could testify that defendant's footwear could not be ruled out as source of foot mark at scene).

Officer testified that he had taken courses in fingerprints and distinctive marks made by footwear. He merely testified that the defendant's footwear was consistent with bloody footwear marks found at the scene. He did not testify on the ultimate issue or testify that in his opinion the defendant's footwear had left these marks.

EVIDENCE: HEARSAY; CO-CONSPIRATOR'S STATEMENT

See Commonwealth v. Brum, 438 Mass. 103 (2002) (co-defendant's statement admissible to show continuing conspiracy in that defendant and co-defendant gave identically false statements to police).

After the co-defendant invoked his 5th Amendment privilege, the prosecutor was allowed to introduce a portion of the co-defendant's statement to the police which was identical to a portion of the statement that the defendant gave to the police. The co-defendant's statement was admitted to show that the defendant and co-defendant were part of a continuing conspiracy to give identically false statements to the police. Id. at 116 n. 20.

The defendant had told the police that he grabbed the victim in a headlock, choked him, and then threw the victim to the ground. The victim was dead before he hit the ground and his wallet popped out of his pocket after he hit the ground. The defendant and co-defendant took the victim's wallet off the floor, took cash out of it, and tore up the wallet on the way home. The prosecution was allowed to introduce the co-defendant's statement that the victim's wallet popped out of his pocket; they had picked it up off the floor and tore it up on the way home. Id. at 116.

The prosecution was allowed to introduce this portion of the co-defendant's statement on the theory that it was not being admitted for the truth. Furthermore, the Court said, since it was identical to the defendant's statement there was no significant prejudice. Id. at 117.

EVIDENCE: HEARSAY; EXPERT TESTIMONY

See Commonwealth v. Duarte, 56 Mass. App. Ct. 714, 722-23 (2002) (expert could testify that based on another expert's lab notes first expert used standard operating procedures; expert could testify to population statistics even though not expert in specific field; not every deviation from lab procedures requires exclusion of evidence).

At a Lanigan hearing involving DNA evidence, the trial judge must find that the underlying theory was scientifically valid and the test was properly performed. Id. at 722. In this case the Cellmark laboratory director testified, based on her review of a lab technician's notes that the lab technician had followed standard operating procedure. Id. at 722. The laboratory director who testified had not been present during the tests. The Court held that the evidence was admissible in accordance with Commonwealth v. Sparks, 433 Mass. 654, 659 (2001). Commonwealth v. Duarte, 56 Mass. App. Ct... at 722-23.

The lab director was also allowed to testify about population frequency although she was not a population geneticist. The Court noted that Cellmark's DNA profiling methodology had previously been validated by SJC in Commonwealth v. Rosier, 425 Mass. 807 (1997). Commonwealth v. Duarte, 56 Mass. App. Ct.. at 723.

EVIDENCE: HEARSAY; EXPERT TESTIMONY

See Commonwealth v. Evans, 438 Mass. 142, 152-53 (2002) (expert may not testify to results obtained by another expert who did not testify).

Under Department of Youth Serv. v. A Juvenile, 398 Mass. 516 (1986), an expert can express an opinion based on a review of test data that was not admitted in evidence but would have been admissible if offered in evidence. That was not what happened in this case, however. Here, it was error for the trial judge to allow an expert to testify to the results obtained by another expert. Commonwealth v. Evans, 438 Mass. at 152. Since the defendant did not object, and there was no substantial risk of a miscarriage of justice, the conviction was upheld. Id. at 153.

In this case a criminalist from the Boston police laboratory testified to the results obtained by another criminalist who had retired. The results indicated that a small amount of human blood had been found on the defendant's knife, but the sample was too small to determine the blood group. Id. at 152. This result was not particularly damaging to the defendant because another expert testified that DNA on the knife matched the victim's DNA. Id. at 153.

EVIDENCE: HEARSAY; LEARNED TREATISES

See Commonwealth v. Reese, 438 Mass. 519, 526-27 (2003) (learned treatise can only be used on cross not as an exhibit).

An expert may be cross-examined on a learned treatise which the judge has determined to be a reliable authority. It may not be introduced as an exhibit.

It was error in this case to allow defense counsel to introduce articles by Dr. Karl Hanson as an exhibit, even at an SDP probable cause hearing. (See **Sexually dangerous persons** for further discussion of this case.

EVIDENCE: HEARSAY; PAST RECOLLECTION RECORDED

See Commonwealth v. Evans, 438 Mass. 142, 157 (2002) (evidence inadmissible as past recollection recorded).

To be admissible as past recollection recorded a memorandum must have been made while the incident was fresh in the witness's mind and the witness must have a failure of memory. Neither of these criteria was met in this case. The memorandum was made by the witness four to six weeks after his conversation with a detective, and he testified that he had his memory refreshed with the memorandum, and had no failure of memory.

EVIDENCE: HEARSAY; SPONTANEOUS EXCLAMATION

See Commonwealth v. Evans, 438 Mass. 142 (2002) (evidence inadmissible; judge in his discretion may decide testimony not trustworthy).

A statement is admissible as a spontaneous exclamation only if a person was so shocked he was not able to deliberate and the statement was not the product of reflective thought. Id. at 154.

An eyewitness to the murder when confronted at the scene shortly after the defendants' arrest said that the defendants were not the men. The judge ruled that this was not a spontaneous exclamation but was the product of deliberation because the eyewitness did not wish to become involved. When the police said they were bringing the suspects over to the eyewitness, the eyewitness refused and said he did not want them to see them. He continued to refuse even after being placed in an unmarked police car. When the defendants walked by, he gave them a cursory look and said that they were not the assailants. Id. at 154.

EVIDENCE: LIMITING INSTRUCTIONS

See Commonwealth v. Cromwell, 56 Mass. App. Ct. 436 (2002) (normally a party's responsibility to request a limiting instruction).

In this case, the judge was not required on her own motion to give a contemporaneous limiting instruction that the jury was not to decide the case on the basis of sympathy for the victim because of her injuries. The judge did give such an instruction in her final charge.

EVIDENCE: MOTION IN LIMINE

See Commonwealth v. Martin, 57 Mass. App. Ct. 272, 274-75 (2003) (if motion in limine is denied prior to trial then defendant must object during trial; failure to object means that the case will not be reversed except for a miscarriage of justice). See **evidence, bad acts of defendant, use of alias** for facts of case.

EVIDENCE: PRIVILEGE, SOCIAL WORKER, PSYCHOTHERAPIST
See Commonwealth v. Olivera, 435 Mass. 325, 330-31 (2002) (psychotherapist-patient privilege and social worker-patient privilege must be asserted by the patient, cannot be asserted by the judge). See note on this case under **Discovery, Bishop**.

EVIDENCE: PRIVILEGE, MARITAL
See Commonwealth v. Walker, 438 mass. 246, 254 n. 4 (2003) (SJC leaves undecided question whether the marital privilege, prohibiting disclosure of communications between husband and wife, should apply in a case in which both husband and wife are jointly engaged in criminal activity).

EVIDENCE: RELEVANCY
See Commonwealth v, Cromwell, 56 Mass. App. Ct. 436, 440-41 (2002) (a victim's injuries were relevant in operating under case).

In this operating under the influence case, where the defendant's car struck the victim's car, the Court said that the victim's injuries were relevant to show that the collision occurred with such force that it was not a mere accident and may have occurred because the driver was impaired.

EVIDENCE: RELEVANCY
See Commonwealth v. Evans, 438 Mass. 142, 151-152 (2002) (mask relevant at defendant's robbery trial to show his intent even though no mask was involved in two robberies with which he was charged).

The defendant was charged with two robberies which occurred within minutes of each other, and the defendant was arrested some ten minutes after the second robbery. Id. at 145-46. The mask which was seized from him at the time of his arrest was relevant to show that the defendant had the means and intent to commit robberies, even though he did not use the mask to commit the robberies. Id. at 152. It was seventy degrees at the time and the jury could reasonably infer that there was no apparent reason for the defendant to have the mask except to assist him in a robbery. Id. at 152. Thus, the mask was properly admitted.

EVIDENCE: RELEVANCY; ABUSE PROTECTION ORDER
See Commonwealth v. Eugene, 438 Mass. 343 (2003) (in murder case fact that the victim brought an abuse protection order against the defendant is admissible).

_____The fact that a victim has obtained an abuse protection order against a defendant is admissible to demonstrate the existence of a hostile relationship which may be relevant to the defendant's motive to kill. Id. at 348.

The judge, over objection, allowed the prosecutor to introduce the fact that the victim had brought a ten day abuse protection order against the defendant five months before the fatal stabbing. The judge excluded the application for the order and the victim's affidavit in support thereof. Id. at 348. The judge also advised the jury that the victim had originally brought the order in the absence of the defendant and had later recanted the underlying allegation. The judge advised the jury that the order could only be considered on the issue of the relationship between the parties as it might bear on the defendant's motive on the day of the stabbing. Id. at 348.

EVIDENCE: RULING ON ADMISSIBILITY BY JUDGE

See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646 (2002) (Appeals Court rules that in deciding on admissibility of evidence as a preliminary matter the trial judge is not bound by the rules of evidence).

In this case, the trial judge considered an affidavit which the defendant had filed in connection with a motion to suppress in deciding whether to admit certain photographs into evidence. In his affidavit, the defendant stated that he had given the photographs to a woman named Katissa Perez to have them developed. The police testified that they had obtained the photos from the owner of a photo shop, whom, investigation showed, had received them from Katissa Perez.

EVIDENCE: SEXUALLY DANGEROUS PERSONS AND RULES OF EVIDENCE

See Commonwealth v. Reese, 438 Mass. 519 (2003) (normal rules of evidence apply to SDP hearings). See **Sexually dangerous persons**

EVIDENCE: SUPPRESSION MOTIONS AND RULES OF EVIDENCE; CITY ORDINANCE

See Commonwealth v. Rushin, 56 Mass. App. Ct. 515 (2002) (different rules of evidence apply to motions to suppress; city ordinance does not have to be introduced at motion to suppress).

The Appeals Court held that, although a judge cannot take judicial notice of a city ordinance in the trial of a case, different rules of evidence apply in motions to suppress.

A police officer testified that he had arrested the defendant for drinking in public, which, he testified, was a violation of a Boston City Ordinance. No other evidence was introduced that such an ordinance existed. Id. at 516. The Appeals Court held that, since the officer had testified to the existence of the ordinance, there was evidence before the judge as to what the ordinance said. Id. at 516, 518. If the defense wished to rebut this evidence, he should have introduced evidence that no such ordinance existed or that the offense was not covered by the ordinance. If he had done so there would have been no probable cause for arrest. Id. at 517 n. 3.

GUILTY PLEAS: DEFENDANT'S FAILURE TO REMEMBER INCIDENT

See Commonwealth v. Desrosier, 56 Mass. App. Ct. 348 (2002) (defendant who cannot remember incident can plead guilty if advised of all elements of offense).

Even if a defendant does not admit or remember all the elements of an offense, he may plead guilty if he is advised of all the elements. Id. at 354-55. Here, the Appeals Court held that the defendant was advised of all the elements of murder by his lawyer and understood all the elements. The defendant's plea to second degree murder was, thus, voluntary and understanding.

At the plea colloquy, the defendant said that he had no memory of the incident, but did not doubt that it occurred the way the prosecution witnesses had indicated. Id. at 352. The defendant had sat through a probable cause hearing at which a witness testified to seeing the victim's body engulfed in flames, and when the witness asked what had happened the defendant said, "She wouldn't fuck me. So I killed her." Id. at 350. The defendant testified at the plea colloquy that he had discussed the pros and cons of going to trial with his lawyer and the defenses which he could raise if they went to trial. Id. at 349.

Five years after the plea hearing, the defendant filed a motion to withdraw his guilty plea. The motion judge allowed the motion on the ground that the defendant had not specifically been advised of all the elements by the plea judge. Id. at 349. The Appeals Court reversed on the ground that the record indicated that the defendant had been advised of all the elements by his

lawyer. Id. at 355. At the motion for a new trial, the defendant's lawyer testified that he had considered the various theories that the prosecution might proceed on, including felony murder in the course of an attempted rape, murder by extreme atrocity and cruelty, and premeditated murder. He further testified that he and the defendant had assessed everything and discussed everything. Id. at 353.

GUILTY PLEAS: IMMIGRATION CONSEQUENCES

See Commonwealth v. Monteiro, 56 Mass. App. Ct. 913 (2002) (failure to advise defendant that one year suspended sentence will automatically result in deportation does not allow the defendant to withdraw his plea of guilty).

When the defendant pled guilty he was given all the immigration warnings required by G.L. c. 278, § 29D, including warning that conviction could result in deportation. His counsel neglected to tell him that a recent amendment to the immigration laws states that a one year suspended sentence would subject him to automatic deportation. The defendant received a suspended one year term to the house.

The Appeals Court held that the defendant could not withdraw his plea. In the absence of a statutory requirement, a defendant need not be informed of the collateral consequences of a guilty plea. The fact that he would be automatically deported if he received a one year suspended sentence was a collateral consequence which would not vacate the plea.

IDENTIFICATION: SUGGESTIVE

See Commonwealth v. Sylvia, 57 Mass. App. Ct. 66 (2003) (defendant failed to show that one-on-one photo identification was unnecessarily suggestive).

A defendant has the burden of showing that a pre-trial identification was unnecessarily suggestive. Although one-on-one identifications are disfavored, they are not impermissibly suggestive so long as the police have good reason to use the procedure and avoid any special elements of unfairness. Exigent circumstances are not required. Id. at 69.

The identifying witness in this case was an undercover police officer who bought drugs from a man in a park while it was still light outside. The undercover officer testified to having observed the defendant for a five minute period. Id. at 69. Thirty or forty minutes after purchasing these drugs, and after he had made another purchase in another area from another individual, the undercover officer was shown two photographs, one of the defendant and one of another individual, who was Hispanic. The officer identified the defendant's photograph but not the other photograph.

The Court said that it was appropriate to show the undercover officer a single photo of the defendant rather than assemble a photo array, since the additional time necessary to assemble a photo array might increase the danger that images of other persons might crowd out the image of the drug seller. Furthermore, there was no evidence of any special element of unfairness in this case. Id. at 69.

INCOMPETENT DEFENDANT: RIGHT TO HEARING ON COMPETENCY, VOLUNTARINESS OF STATEMENTS

See Commonwealth v. Boateng, 438 Mass. 498 (2003) (judge on his own motion should conduct competency hearing and hearing on voluntariness of statements when issue raised by evidence).

A judge is required to conduct a sua sponte inquiry into a defendant's competency only if there exists a "substantial question of possible doubt" as to the defendant's competency. The SJC held that there was no substantial question that required the judge's sua sponte action in this case. Id. at 503. The defendant had a long history of mental illness, but he had been found competent to stand trial at a competency hearing one week before trial and the defendant's counsel advised the judge that nothing had occurred in the intervening week which warranted a new inquiry. Id. at 503.

A judge is also required, sua sponte, to conduct a hearing on the voluntariness of the defendant's statements when voluntariness is at issue. Id. at 504. In this case, the defendant's defense of lack of criminal responsibility should have alerted the judge to his duty to conduct a voluntariness hearing and it was error not to have held such a hearing. Id. at 505. The error was waived, however, because the defendant's counsel did not object and the SJC found there was no substantial likelihood of a miscarriage of justice. Id. at 505. See **Postconviction remedies: pre-appeal motion for new trial, standard of review** for further discussion of this case.

INCOMPETENT DEFENDANT: DISMISSAL OF CHARGES

See Commonwealth v. Hatch, 418 Mass. 618 (2003) (charges against incompetent defendant may be dismissed if judge finds a lack of substantial evidence to support a conviction).

An incompetent defendant may obtain dismissal of the charges against him by two means. The charges will be dismissed on the date he would have been eligible for parole if he had received the maximum sentence on the charges, or they can be dismissed if a judge after hearing finds a lack of substantial evidence to support a conviction. See G.L. c. 123, §17 (b); Commonwealth v. Hatch, 418 Mass. at 620..

At a hearing to determine whether there is substantial evidence to support a conviction, an incompetent defendant has a right to subpoena and cross-examine witnesses, including the victim. Id. at 625.

The standard of proof is not a directed verdict standard. The substantial evidence standard requires the judge to decide whether experience permits the reasoning mind to make a finding of guilty. Id. at 623. A judge must weigh all the evidence (not just that presented by the prosecution) and consider the credibility of witnesses. Id. at 623. On the other hand, his decision must not be based on his personal view of the evidence but on whether a rational jury could find the defendant guilty beyond a reasonable doubt. Id. at 623.

JURY: INSTRUCTIONS ON PRESUMPTIONS

See Commonwealth v. Gonsalves, 56 Mass. App. Ct. 506 (2002) (jury correctly instructed on presumption that person in possession of stolen motor vehicle with altered VIN can be found guilty of larceny).

The judge correctly advised the jury that possession of a stolen motor vehicle with altered VIN numbers may be sufficient to convict but the burden of proof was on the prosecution to prove all elements beyond a reasonable doubt. He did not place the burden on the defendant of explaining his possession of recently stolen property. See **crimes, larceny, motor vehicle.**

JURY: INSTRUCTIONS ON INVOLUNTARY MANSLAUGHTER, ACCIDENT. See Commonwealth v. Figueroa, 56 Mass. App. Ct. 641 (2002) (evidence in this involuntary manslaughter case was insufficient to require an instruction on accident). See **Crimes, manslaughter, involuntary, accident.**

JURY: INSTRUCTIONS ON SELF-DEFENSE
See Commonwealth v. Galvin, 56 Mass. App. Ct. 698 (2002) (self-defense instruction required if self-defense raised by prosecution's case, defense case, or a combination of the two). See **defenses, self-defense.**

JURY: INSTRUCTIONS ON RAPE, CONSENT, AND ALCOHOL
See Commonwealth v. Molle, 56 Mass. App. Ct. 621 (2002) (evidence in this case was insufficient to justify an instruction on the effect of alcohol on the victim's ability to consent since there was no evidence that the victim's ability to consent was substantially impaired). See **Crimes, rape, consent & alcohol** for further discussion of this case.

JURY: INSTRUCTIONS ON MISSING WITNESS
See Commonwealth v. Tripolone, 57 Mass. App. Ct. 901 (2003) (refusal to instruct or to allow comment on missing witness OK because witness was only a peripheral witness).

The Appeals Court says that a missing witness instruction should only be given in a clear case and with caution.

In this rape case, a three man police team visited the victim's mobile home after the rape. They videotaped the victim's living quarters and assembled physical evidence, including a bed spread and clothing. Both the evidence list and the videotape were lost before trial. Id. at 902. Two of the three man team testified. They had varying memories as to who picked up what evidence and when the victim had on the various items of clothing which were in evidence. Id. at 902-3.

The judge refused to give a missing witness instruction or allow comment on the prosecution's failure to call the third member of the three man team. Id. at 901. The Appeals Court held that the judge was correct in deciding that this witness was a peripheral witness and a missing witness instruction would only have led the jury to speculate. Id. at 903.

JURY: UNDER REPRESENTATION OF RACIAL OR ETHNIC GROUP
See Commonwealth v. Arriaga, 438 Mass. 556, 562-563 (2003) (SJC adopts absolute disparity test which makes it virtually impossible for minorities to show discrimination in jury selection).

In order to show that a given group is under represented in a jury pool, a defendant must show that the group involved is (1) a distinctive group, (2) that the group is not fairly represented in the venire in relation to its proportion of the population, and (3) that under representation is due to systematic exclusion. Id. at 562-63. No under representation was found.

The Court held that Hispanics are a distinctive group in the community, id. at 563, but then adopted a test which makes it virtually impossible for Hispanics to show under representation.

The defendants in this case pointed out that the federal census had shown that 5.5% of the adult population of Essex County was Hispanic and only 3 persons in the 342 person jury venire (there were 345 in the venire but only 342 had their names recorded) had Spanish surnames appearing in the Spanish surname list, which had been compiled in the 1990s. The defendants argued that more than two thirds of the Hispanics living in this country have surnames appearing in this list and, thus, it was fair to conclude that only 1.46% of the persons in the jury pool were Hispanics.

The Court rejected this approach. It said that 342 people in a jury venire was not a statistically significant sample, id. at 564, and, in addition, the SJC applies an absolute disparity

test to determine whether under representation of a group is significant. The absolute disparity test subtracts the percentage of the group's population in the jury venire (in this case 1.46 %) from the percentage of the group's population in the community (in this case 5.5%). The absolute disparity in this case was 4.04% and since it was less than 10% it was not significant. Id. at 565.

It is obvious that even if no Hispanics were ever called for jury duty in Essex County the absolute disparity would only be 5.5% and would not be considered significant. In fact, no minority group with less than 10% of the population would ever be able to show under representation, even if no member of the minority was ever called for jury duty. On the other hand, the larger the distinctive group is the easier it is to show under representation. If 40% of the population is made up of white males and only 29% of the white male population is called for jury duty then the white male population has been discriminated against under this test.

The Court conceded that the absolute disparity test has been criticized, and it stated that it would not apply the test mechanically, and evidence of disparity of less than 10% could support a conclusion of under representation of smaller minority groups if coupled with persuasive proof of systematic exclusion. The Court found no systematic exclusion in this case, however. Id. at 566.

The Court did say that in the future the jury commissioner should require the disclosure of racial and ethnic background of potential jurors on the juror confirmation form. Id. at 571-72.

JURY: UNDERREPRESENTATION OF DISTINCTIVE GROUP

See Commonwealth v. Evans, 438 Mass. 142 (2002) (College students are not a distinctive group for Sixth Amendment purposes).

JURY: WAIVER

See Commonwealth v. Berte, 57 Mass. App. Ct. 29 (2003) (misadvice as to sentence does not impair defendant's waiver of jury trial).

The defendant waived his right to jury trial, and in the colloquy concerning his waiver, the judge advised the defendant that the minimum sentence was ten years for house invasion armed with a firearm. After the defendant waived his trial and was convicted the judge reconsidered and sentenced the defendant to twenty years to twenty years and one day. The Court held that the defendant could not withdraw his waiver since the minimum sentence would have been the same after a jury trial. Id. at 34-35.

The case was sent back for resentencing, however, because the maximum sentence for the offense was twenty years and the minimum really was ten years.

POSTCONVICTION REMEDIES: HABEAS CORPUS; FEDERAL; INCOMPETENT COUNSEL

See Woodford v. Visciotti, 123 S. Ct. 357 (2002) (state court decision was not contrary to Supreme Court precedents and was not an unreasonable application of precedents concerning inadequacy of counsel)

To obtain reversal on federal habeas corpus, a state court petitioner must show that the state decision was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

In this case, the United States Supreme Court reversed the decision of the Ninth Circuit Court of Appeal, which had held that the California Supreme Court's decision was contrary to the decision in Strickland v. Washington, and was an unreasonable application of Supreme Court precedents.

The California Supreme Court had held that the defendant's trial counsel had been constitutionally inadequate in the penalty phase of a death penalty case, but that his inadequacy did not prejudice the jury's decision to award the death penalty.

Strickland had held that to prove prejudice a defendant has to establish a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." The Ninth Circuit Court of Appeals felt that the state court had required the defendant to prove by a preponderance of the evidence that the result would have been different, and had, thus, applied the wrong legal standard. The United States Supreme Court disagreed. It pointed out that the state court had specifically set forth the "reasonable probability" criterion of Strickland, and had referred to it through out the opinion.

The Ninth Circuit also held that even if the state court had applied the Strickland standard, it had unreasonably applied this standard because the conclusion that the defendant had suffered no prejudice at the penalty phase was "objectively unreasonable." The state court had held that despite defense counsel's failure to present certain mitigating evidence, the aggravating factors were overwhelming. (The state court characterized the killing as a cold-blooded execution style killing in the course of a pre-planned robbery). The Ninth Circuit held that the state court had failed to take into account the totality of the available mitigating evidence and the aggravating factors were not overwhelming. The United States Supreme Court disagreed. It pointed out that the state court opinion had mentioned all the mitigating facts which it had supposedly not considered. The Ninth Circuit felt that because the jury deliberated for a full day on the penalty phase before imposing the death penalty, the defendant was prejudiced by failure to introduce the mitigating facts. The Supreme Court held that the mere fact that the Ninth Circuit disagreed with the state court decision was not enough. Since the state court's decision that the defendant had not been prejudiced was not "objectively unreasonable," it should have been upheld.

POSTCONVICTION REMEDIES: HABEAS CORPUS; FEDERAL; COERCED JURY VERDICT

See Early v. Packer, 123 S.Ct. 362 (2002) (state court opinion was neither contrary to Supreme Court precedents nor an unreasonable application of precedents concerning coerced juries)

A state court opinion will not be reversed on habeas corpus simply because it fails to cite federal law, so long as neither the reasoning nor the result contradicted United States Supreme Court precedents, and was not an unreasonable application of these precedents.

In this case, in which a state jury was allegedly coerced, the United States Supreme Court reversed the Ninth Circuit Court of Appeals which had held that the state appellate court had violated clearly established federal law announced in Lowenfeld v. Phelps, 484 U.S. 231 (1988), and Jenkins v. United States, 380 U.S. 445 (1965).

The Supreme Court stated that a state court decision is "contrary to" Supreme Court precedents if "it applies a rule that contradicts" governing Supreme Court precedents or if it "confronts a set of facts materially indistinguishable" from a U.S. Supreme Court decision and arrives at a different result. Here, the fact that the state opinion had not cited federal law was not significant, since state law was actually more restrictive in this area than federal law because it prohibited the giving of an Allen charge to a deadlocked jury.

The Ninth Circuit had held that the state court had failed to apply the totality of circumstances test of Lowenfeld, in the state decision which held that the state jury had not been coerced. The Ninth Circuit said that the state decision only mentioned three particular facts and failed to consider other "critical facts." The Supreme Court held, however, that the state opinion

had mentioned all the "critical facts" which the Ninth Circuit said it had failed to consider, and, thus, there was no basis for the Ninth Circuit's holding that the state court had failed to consider there facts, or failed to consider their cumulative effect.

The Ninth Circuit also held that the state court opinion was contrary to the Supreme Court opinions in Jenkins v. United States, 380 U.S. 445 (1965), and United States v. Gypsum Company, 438 U.S. 422 (1978). The Supreme Court pointed out, however, that neither of these cases were decided on constitutional grounds, but both were decided on the Supreme Court's supervisory powers over the federal courts. Thus, they had no application to the state courts, and the Ninth Circuit was in error because it had failed to show that the state opinion was contrary to clearly established Supreme Court law.

POSTCONVICTION REMEDIES: HABEAS CORPUS; STATE

See Sheriff of Suffolk County v. Pires, 438 Mass. 96 ((2002) (habeas corpus can only be used when person entitled to immediate release and may not be used as substitute for appeal where appellate remedies exist).

A G.L. c. 211, § 3, petition is the proper method of appealing a revocation of bail. A petition for habeas corpus in the Superior Court cannot be used as a substitute.

In this case the defendant was released on bail for illegal possession of a firearm. He was then arrested on a new charge of assault with intent to murder. After examining the police reports concerning the new incident, a district court judge found probable cause to believe the defendant had committed the new offense and revoked his bail. The defendant filed a petition for habeas corpus in the Superior Court and a Superior Court judge remanded to the district court for another bail hearing at which the defendant was to be allowed to call witnesses. The Attorney General (representing the sheriff) brought a G. L. c. 211, § 3, petition and argued that habeas corpus was not a proper method of appealing from a bail revocation order. Sheriff of Suffolk County v. Pires, 438 Mass. at 96-97.

The SJC agreed. Although G. L. c. 248, § 25, authorizes the SJC and the Superior Court to set bail or discharge for whatever cause a person may be held, there are two traditional limitations which have been read into this statute: habeas corpus cannot be used as a substitute for appeal when appellate remedies are available, and habeas corpus cannot be used unless the defendant would be entitled to his immediate release from custody. Sheriff of Suffolk County v. Pires, 438 Mass. at 99-100. In this case, a c. 211, § 3 petition was the proper method of appealing a revocation of bail. Sheriff of Suffolk County v. Pires, 438 Mass. at 100-101. Furthermore, the defendant in this case was not entitled to his immediate release from custody because he had been held on $25, 000 bail on the new charges. Id. at 101.

POSTCONVICTION REMEDIES: POSTAPPEAL MOTION FOR NEW TRIAL; MISCARRIAGE OF JUSTICE STANDARD

See Commonwealth v. Randolph, 438 Mass. 290 (2002) (claim of error is normally waived if not raised at first available opportunity; waiver can be ignored in case of miscarriage of justice, but there was no miscarriage in this case).

A claim of error will normally be waived if not raised at the first available opportunity. Id. at 294. There are several exceptions, though. In case of the clairvoyance exception and resurrection exception the error is revived as though it had been preserved. The clairvoyance exception applies to errors of a constitutional dimension when the theory on which the defendant relies was not sufficiently developed at the time of trial or appeal. Id. at 295. The "resurrection"

exception occurs when the trial judge on a motion for new trial, filed and considered before direct appeal, decides to consider an issue on the merits, despite the defendant's failure to raise it at the proper time. Id. at 295.

In a case where defendant brings a postappeal motion for new trial, as the defendant did here, the standard of review is substantial risk of a miscarriage of justice (no clairvoyance exception applied in this case). Id. at 297. If the claimed error is that counsel failed to preserve a claim for appeal, then the ineffectiveness has no bearing on the inquiry since the Court will not reverse unless there was a substantial risk of a miscarriage of justice. Id. at 295-96.

A substantial risk of a miscarriage of justice exists when there is "a serious doubt whether the result of the trial might have been different had the error not been made." Id. at 297.

In this capital case, the defendant filed a second motion for new trial, which was denied. He then petitioned the single justice pursuant to the "gatekeeper" provision of G.L. c. 278, §33E, and the single justice allowed his petition to appeal to the full bench with regard to possible error in the judge's instructions on murder. Commonwealth v. Randolph, 438 Mass. at 291.

The SJC found that the judge's instruction on provocation impermissibly shifted the burden to the defendant. Id. at 298. Provocation was a live issue since there was evidence that the victim violently attacked the defendant with a bat, beat his brother, and chased the defendant with a knife immediately before the killing. Thus, the judge's instruction constituted prejudicial error. Id. at 299.

But there was no miscarriage of justice. The prosecution's witnesses gave a different account of events than the defendant's witnesses. The prosecution witnesses testified that the victim entered his own apartment and found the defendant being attacked by the defendant and his brother with a board and bat. Since the jury found the defendant guilty of armed assault in a dwelling and assault and battery by means of a dangerous weapon, the jury must have believed the testimony of the prosecution witnesses and rejected the testimony of the defense witnesses concerning the events leading up to the killing. Id. at 300-301.

Errors in the instructions concerning the three prongs of malice did not prejudice the defendant because the judge correctly instructed on deliberate premeditation, and since the jury found the defendant guilty of deliberate premeditation this finding implied a finding of a specific intent to kill. Id. at 301-302.

POSTCONVICTION REMEDIES: POSTAPPEAL MOTION FOR NEW TRIAL; MISCARRIAGE OF JUSTICE STANDARD

See Commonwealth v. Kilburn, 438 Mass. 356 (2003) (no miscarriage of justice where counsel failed to object to judge's prejudicial error in failing to instruct on merger doctrine in felony murder case).

In a felony-murder case, the act which constitutes the felony must be separate from the act which causes the murder. Id. at 359. Here there were two separate acts of armed assault in a dwelling: the defendant pointed a gun at the victim when the victim opened the door and the defendant later shot and killed the victim. Id. at 359. It was prejudicial error for the judge to fail to instruct the jury that they had to find the defendant guilty of the first assault to find him guilty of felony-murder. Id. at 361. The defendant waived this error by failing to object at trial and by failing to raise a merger claim on appeal. Id. at 360.

The defendant filed a rule 30 motion for a new trial which was denied by the trial judge. He then filed a motion to the single justice under the "gatekeeper" provision and the single justice allowed the appeal to the full bench. Id. at 356-57. Since there was prejudicial error, the SJC

considered whether there was a substantial risk of a miscarriage of justice. Id. at 360, 361.

But there was no miscarriage of justice. In this case only one witness testified to both the first and second assault. Since the jury convicted the defendant, the SJC reasons that they must have believed this witness. Id. at 362.

POSTCONVICTION REMEDIES: PRE-APPEAL MOTION FOR NEW TRIAL; STANDARD OF REVIEW

See Commonwealth v. Boateng, 438 Mass. 498 (miscarriage of justice standard applies unless motion judge resurrects unobjected-to error)

The trial judge committed error by failing to hold a hearing on the voluntariness of the defendant's statements. Since the defendant did not object, and the error was not resurrected by the motion judge, the miscarriage of justice standard applied. Id. at 505-06.

In this case, the appeal was stayed, pending the hearing on the defendant's motion for a new trial. Id. at 502-03. The motion was heard by a different judge than the trial judge, id. at 503, who ruled that the failure of the defendant's counsel to request a voir dire on the voluntariness of the defendant's statements was not ineffective assistance. Id. at 505.

The SJC held that if the motion judge had resurrected the error by considering it on the merits, then the SJC would also consider the error on the merits on appeal. Id. at 505. In this case, however, the motion judge did not resurrect the error, so the SJC would only consider whether failure to object resulted in a substantial likelihood of a miscarriage of justice. Id. at 505. The SJC held that there was no such likelihood. The police had testified that the defendant appeared calm and lucid when he spoke to them; the defendant's statements were not central to the case; and the judge had instructed the jury to disregard the defendant's statements if they found they were involuntary. Id. at 505-506.

Although there was no substantial likelihood of a miscarriage of justice on the murder indictment, the SJC did find a substantial likelihood of a miscarriage of justice on the assault with intent to murder indictment because of erroneous instructions. See **crimes: assault with intent to murder**.

POSTCONVICTION REMEDIES: MOTION FOR NEW TRIAL AND INCOMPETENCY OF COUNSEL

See Commonwealth v. Cortez, 438 Mass. 123 (2002) (normally an incompetency of counsel issue should be raised by a motion for a new trial so the trial judge can make factual findings).

In this case, a state police officer testified that the two latent fingerprints found inside the victim's apartment were those of the defendant. The defense counsel attempted to impeach the officer with a report signed by a state police technician, who had come to a contrary conclusion. The judge excluded this evidence and advised defense counsel that he would have to call the technician. The defense did not call the technician. On appeal, appellate counsel attempted to argue that defense counsel was ineffective for failure to call the technician. The SJC refused to consider this issue. The Court said that the issue should have been presented to the trial judge as a motion for new trial because there may have been strategic reasons for counsel's failure to call the technician, and this is a factual issue which the trial judge should decide. Id. at 131.

PROBATION REVOCATION: NOTICE; ADMISSIBLE EVIDENCE

See Commonwealth v. Simon, 57 Mass. App. Ct. 80 (2003) (no prejudice found even though defendant was found guilty of a different violation than that alleged in the probation violation

notice; statements obtained in violation of Miranda and even involuntary statements are admissible at a probation surrender hearing).

The Appeals Court held that even if the probation violation notice was defective the defendant had to show prejudice. Id. at 84-86. The defendant received notice that he was in violation of the terms of his probation because he had been driving home from a football game under the influence and after his license had been suspended. The notice did not mention any violation for driving on a public way earlier in the day. Id. at 84. The police reports indicated that after his arrest for driving under the influence the defendant admitted driving to the football game earlier in the day, id. at 83, and the judge credited this portion of the report. Id. at 83. The Appeals Court found that even though the notice might have been defective the defendant was not prejudiced since at the beginning of the hearing the defense counsel stated that she knew that the defendant was accused of two incidents of operating after suspension and that he had admitted to the first such operation. The Court said that counsel was amply prepared at the start of the hearing on this issue and thus had failed to show prejudice. Id. at 85-86.

The defendant argued that his statement to the police was involuntary and taken in violation of Miranda because he was intoxicated. The Court said that even if this was true the statement would still be admissible at a probation surrender hearing. The Court reasoned that the case was similar to cases involving the exclusionary rule of evidence in search and seizure cases. Id. at 86-90.

PROBATION REVOCATION: HEARSAY

See Commonwealth v. Ivers, 56 Mass. App. Ct. 444 (2002) (hearsay evidence in this case was too vague to sustain a finding defendant in violation).

In this case, a Chelsea probation officer testified that he had received information from an East Boston probation officer that the East Boston probation officer had not seen the defendant for some time and the defendant had not complied with the terms of the Office of Community Corrections. The judge found the defendant in violation and wrote that his findings were based on the testimony of the Chelsea probation officer. Id. at 445.

The Appeals Court held that the hearsay was too vague to sustain a finding. The Court said it would be proper for the Chelsea probation officer to rely on a report from the East Boston probation officer that the defendant was in violation provided the alleged violation was within the personal knowledge of the East Boston probation officer. Id. at 446. Here this was not clear, since it was unclear whether the defendant was to report to the East Boston probation officer or to the Office of Community Corrections. For hearsay to be considered reliable it should be detailed rather than conclusory. Id. at 446-47.

The Court also said that the judge had not complied with Rule 6(b) of the district court rules for probation violations. This rule provides that the judge should include a written finding as to why he considers the hearsay "substantially trustworthy" and "demonstrably reliable." Here the judge merely said that he based his finding on the testimony of the probation officer who had repeated the hearsay. Id. at 447-48.

SEARCH AND SEIZURE: ARREST; PROBABLE CAUSE
See Commonwealth v. Landry, 438 Mass. 206 (2002) (police had no probable cause to arrest a person in the needle exchange program if person produced an identification card for program). See **crimes, controlled substances, possession of hypodermic needle**

SEARCH AND SEIZURE: ABANDONMENT OF PROPERTY
See Commonwealth v. Duarte, 56 Mass. App. Ct. 714, 721 (2002) (when defendant dropped knife in police cruiser he abandoned it, and had no standing to object to seizure).

A person who abandons property has no standing to object to its seizure. Here the defendant was arrested for a knife point rape and dropped a knife in a police cruiser on the way to the station. The Court said he had voluntarily given up any expectation of privacy in the knife. See **search and seizure: entry of home without a warrant** for further discussion of this case.

SEARCH AND SEIZURE: ARREST; SEARCH INCIDENT TO; FRUIT OF POISONOUS TREE AND INEVITABLE DISCOVERY
See Commonwealth v. Blevines, 438 Mass. 604 (2003) (seizure of keys pursuant to arrest for drinking in public OK but using keys to unlock car trunk was illegal; cocaine found by shining light in car suppressed as fruit of the poisonous tree).

The evidence in this case was suppressed under G.L. c. 276, s. 1. This case illustrates the importance of moving to suppress under the Massachusetts statutes as well as under the State and Federal Constitution since the SJC noted that the investigative use of keys seized from an arrested or detained person may be admissible under the Federal Constitution. Fortunately, G.L. c. 276, s. 1, limits searches incidental to an arrest to the limited purpose of seizing evidence of the crime for which the arrest is made or for the purpose of seizing a weapon. Commonwealth v. Blevines, 438 Mass. at 607.

In this case, the defendant was arrested for drinking in public, and the police searched the defendant for "whatever objects" were in his pocket and seized a key chain with five keys on it. Id. at 605. The SJC upheld this part of the search on the ground that whenever the police feel a hard object in a pocket they have a right to remove it because it may be a weapon. Id. at 608. The fact that the officer said he was searching for "whatever objects" were in the defendant's pockets did not make the search illegal because the officer's subjective intent is irrelevant. Id. at 608.

The police noticed that one of the keys was a GM type car key, and they proceeded to try the keys in cars in the parking lot where the defendant was arrested in an attempt to "identify" the defendant. Id. at 606. They found that the key opened the trunk of a Chevrolet, and upon shining a flashlight through the window noticed a bag of cocaine. Id. at 606. The cocaine was suppressed.

Although the keys could be seized as a potential weapon, they were not evidence of the crime of drinking in public, so they could not be used for investigative purposes. Id. at 608-09. The cocaine was discovered only because the police tried the key in the cars in the parking lot. Although shining a light into a car is not a search, the prosecution had failed to show that the police would have inevitably examined the car in this way if they had not made illegal use of the keys. Id. at 610-11.

SEARCH AND SEIZURE: ARREST, EXTRATERRITORIAL
See Commonwealth v. Nicholson, 56 Mass. App. Ct. 921 (2002) (police officer who had been

sworn in as a special police officer in adjoining town had authority to stop defendant in adjoining town).

A police officer does not have authority to stop a motor vehicle outside his jurisdiction, id. at 922; however, G.L. c. 41, §99, gives a city or town authority to specially designate police officers from other cities and towns and give them the same immunities and privileges as they have in their own city or town. Commonwealth v. Nicholson, 56 Mass. App. at 922.

In this case, a West Bridgewater police officer stopped a car in East Bridgewater. Id. at 921-22. This would have been illegal, except that the officer had been sworn in as a special police officer in East Bridgewater. Id. at 922. Therefore, the stop was legal.

SEARCH AND SEIZURE: ENTRY OF DWELLING WITHOUT WARRANT; CONSENT

See Commonwealth v. Hill, 57 Mass. App. Ct. 240, 244 (2003) (trial judge's finding of consent supported by the evidence).

When police knocked on defendant's door, he knew who they were. He asked what they wanted, and freely stepped aside to allow them to enter the apartment to continue their conversation. No evidence was presented that the defendant objected, and since defendant had had more than 125 entries on his probation record, the judge could conclude he was aware of his rights.

SEARCH AND SEIZURE: ENTRY OF DWELLING WITHOUT WARRANT TO "SECURE FROM THE INSIDE" WAS ILLEGAL

See Commonwealth v. DeJesus, 56 Mass. App. Ct. 523 (2002) (evidence suppressed). Further appellate review **granted** 438 Mass. 1106.

The prosecution argued that if the police have probable cause to search an apartment then they have a right to secure the apartment from the inside pending the issuance of a search warrant. Id. at 527. The Appeals Court rejected this argument and held that the police had no right to enter an apartment in the absence of exigent circumstances. Id. at 529-530.

The defendant was arrested for being involved in the sale of drugs to an undercover agent. The police received information which led them to believe that there were additional drugs stored in the defendant's apartment. Id. at 524. After seizing the defendant's keys, the police went to his apartment, knocked on the door, and, when no one answered, entered the apartment. They checked the apartment for occupants and in the course of their "sweep for occupants" noticed cocaine and cocaine packaging materials in plain view on the kitchen table. Id. at 525. The officers then secured the apartment pending the issuance of a search warrant.

The Court held that, although the police have a right to secure a building from the outside pending the issuance of a search warrant, they have no right to secure it from the inside, unless there is a danger of the immediate destruction of evidence. Here there was no such danger. Mere speculation that there might still be people in the apartment after the police knocked on the door was not sufficient. Id. at 532-534.

SEARCH AND SEIZURE: ENTRY OF HOME WITHOUT WARRANT LAWFUL; EXIGENT CIRCUMSTANCES

See Commonwealth v. Duarte, 56 Mass. App. Ct. 523 (2002) (rape at knife point which had just occurred justified entry of defendant's apartment to arrest defendant without a warrant).

The defendant was arrested 45 minutes after the rape. The victim was raped at knife point and her hand was cut in the struggle. The defendant threatened to come back and kill the victim if

she told anyone. Both the victim and her brother knew the defendant and the brother knew where the defendant lived. The police immediately went to the defendant's home, entered his home, and made the arrest without a warrant. Id at 715-16. The Court held that exigent circumstances justified the entry of the home without a warrant because crime of violence involving a weapon had just occurred, and since the defendant was known to the victim there was a danger he might flee. Id. at 719-720.

SEARCH AND SEIZURE: ENTRY OF HOME WITHOUT WARRANT; FRUIT OF POISONOUS TREE; REASONABLE SUSPICION; WHEN "SEIZURE" OCCURS

See Commonwealth v. Swanson, 56 Mass. App. Ct. 459 (2002) (entry of defendant's room was the product of an illegal seizure which was not even based on reasonable suspicion).

In this case, an illegal seizure of the person occurred when the defendant was told not to leave his room, police observation of the defendant throwing something into the closet was the product of this illegal seizure, and, thus, could not be used to justify subsequent entry and search of defendant's closet.

The defendant and Milliken lived in separate rooms on the first floor of a rooming house. There was also a common hallway on the first floor, which the police entered to arrest Milliken on a warrant. Id. at 460. On the way to Milliken's room, the police looked into the defendant's room and saw a razor blade and plate on the bed and noticed that it was smoky. Id. at 460, 462. The police told the defendant and three other persons in the room to stay where they were and posted a police officer at the door. Id. at 460. On the way back from Milliken's room, the police noticed the defendant throw something in his closet. A police officer entered the room, searched the closet, and found heroin. Id. at 460-61.

The Appeals Court held that a seizure of the person occurred when the defendant was told to stay in his room, and, at that point, the police lacked reasonable suspicion to believe that the defendant was involved in a crime. Id. at 462. The subsequent police observation of the defendant throwing something into his closet was the product of this illegal seizure, and could not justify the entry and search. Id. at 463.

SEARCH AND SEIZURE: ENTRY OF HOME WITHOUT WARRANT; FRUIT OF POISONOUS TREE AND CONSENT

See Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812 (2002) (police may enter portion of home which drug dealer uses for purpose of selling drugs but entry of other portion of home was illegal and invalidated consent to search obtained from defendant's parents).

The first time that police entered the defendant's home they made an undercover buy and the Appeals Court held this entry was legal since a drug dealer cannot object to the entry of that portion of the premises which he invites persons to enter to buy drugs. Id at 813, 815.

The second time the police entered the defendant's home they entered a different portion of the house without a warrant and the Appeals Court held this entry was illegal. Id. at 814, 816. The police then confronted the defendant's parents inside the house and, after talking to the parents for approximately an hour and a half, talked them into signing a consent form. The consent was held to be a product of the illegal entry and, therefore, invalid. Id. at 815, 817-18.

The first time the police entered the defendant's home, they went through a back door and up a staircase to the second floor (which appeared to be an attic) and then down two hallways which led to a room where drugs were being sold. The second time the police entered they went up to the second floor, the same way they had gone the first time, but then they descended to the

first floor where the defendant's parents were. They spoke to the parents for an hour and a half and eventually convinced them to sign a consent form. They explained to the defendant's parents that they had just bought drugs inside the house and intended to apply for a search warrant. Id. at 813-15.

SEARCH AND SEIZURE: ENTRY OF APARTMENT BUILDING WITHOUT WARRANT

See Commonwealth v. Dora, 57 Mass. App. Ct. 141 (2003) (no violation of defendant's rights to enter common area of apartment building open to other tenants but not to public).

The police could enter the locked hallway to the defendant's apartment, which was open to other tenants and their invitees but not to the public. Id. at 147-48. The defendant had no reasonable expectation of privacy in this area. The entry would have been illegal if the defendant and his invitees had exclusive access to this hallway. Id. at 145.

The defendant lived in an apartment building with approximately 120 tenants. The front door to the apartment building was locked so that only tenants and their invitees had access to the common hallway. Id. at 143-44. The police unlocked the front door to the building using keys which had been found in the victim's room after a break. They then proceeded to the defendant's fourth floor apartment and determined that the keys which had been found opened the door to the defendant's apartment. Id. at 143. The Court held that since 120 tenants and their invitees also had access to this hallway the defendant did not have a reasonable expectation of privacy in the hallway. Id. at 145, 147-48. The defendant could not object to the police trying the keys in his door because they had reasonable suspicion that he was guilty of the break (see reasonable suspicion)

SEARCH & SEIZURE: ENTRY WITH NO KNOCK WARRANT

See Commonwealth v. Jimenez, 438 Mass. 213 (2002) (evidence suppressed because circumstances justifying no knock warrant did not exist at time of entry and search).

As part of the common law of Massachusetts, the police must knock and announce their presence and purpose prior to executing a search warrant. Id. at 215. In Massachusetts police may obtain a no knock warrant if there is probable cause to believe that evidence will be destroyed or officer put at risk if rule followed. Id. at 216. Under the Federal Constitution a no knock warrant may be obtained if there is reasonable suspicion to believe this is the case. Even if police have a valid no knock warrant, they must make a "threshold reapprisal" to determine whether conditions still exist before proceeding without knocking. Id. at 217.

In this case the police obtained a no knock warrant which the Appeals Court found had not been based on probable cause. The SJC rejected this part of the Appeals Court's holding. The SJC said that the warrant could not be justified on the ground of officer safety simply because the affidavit stated that the defendants were drug dealers and drug dealers often possess firearms. Id. at 219. This was not even sufficient to satisfy the reasonable suspicion standard of the Federal Constitution. Id. at 219. The SJC did find, however, that there was probable cause to believe that evidence would be destroyed if the police first knocked. The statement in the affidavit that drug dealers often flush drugs down the toilet was not enough. But the affidavit also stated that the front door to the apartment building three floors below the apartment to be searched was generally locked; there were windows overlooking the route which the police would have to take to approach the apartment; and the whole drug operation had been conducted in extreme secrecy. Id. at 220.

The SJC found, however, that at the time of the search probable cause for a no knock warrant no longer existed. It was dark out. No one was at the windows or watching for the police, and the front door was unlocked. Thus, the police had no right to proceed to the second floor and use a battering ram to knock down the door to the defendant's apartment without knocking. Id.at 222.

SEARCH AND SEIZURE: ENTRY PURSUANT WARRANT; PROBABLE CAUSE

See Commonwealth v. Alfonzo A., 438 Mass. 372 (2003) (affidavit satisfied Aguilar-Spinelli test because informant had personal knowledge of facts; informant gave extensive detail; police were able to corroborate portions of the detail; and the informant's identity and whereabouts were known to police). Appeals Court overruled.

The SJC said that although police knowledge of an informant's identity and whereabouts standing alone would not be adequate to confirm an informant's reliability, it is a factor which may be considered. Id. at 376. The SJC also said that detailed information alone does not establish reliability, but police corroboration of detail is a strong indicator of reliability. Id. at 377. In this case, the informant gave a detailed description of the stolen guns involved, the container they were placed in and the place where they were stored. Id. at 376. He told the police that the guns had been obtained from a break-in at West Roxbury the day before, and the police were able to corroborate this fact because they knew that guns matching the description given had been taken in a break in West Roxbury. Id. at 377. The informant was not a faceless anonymous informant but the police knew his identity and whereabouts, although he was not named in the affidavit. Id. at 375-76.

SEARCH AND SEIZURE: ENTRY PURSUANT TO WARRANT; PROBABLE CAUSE

See Commonwealth v. Walker, 438 Mass. 246, 250 (2002) (warrant valid because based on probable cause to believe that items sought were related to criminal activity and would be found in place to be searched).

The Court found that the affidavit to the search warrant established probable cause to believe that gold jewelry stolen from the victim, shoes with a "Vibrant" type sole, bloody clothing, and the murder weapon might be found at the defendant's new address. Id. at 250

The affidavit stated that the defendant's fingerprints were found on plastic bags on the victim's body. The victim wore gold jewelry which was not found on the victim or in his room after the victim had been shot in the head. A bloody shoe print from a "Vibrant" type sole was found on a pillow recovered from the crime scene (which was the victim's room were he was shot in the head). The affidavit also stated the defendant lived across the hallway from the victim at the time of the murder. Shortly after the murder and early in the month, the defendant moved to a new address despite the fact that his rent was paid up until the end of the month. The defendant gave inconsistent statements as to why he had moved. Id. at 250.

SEARCH AND SEIZURE: ENTRY PURSUANT WARRANT; NO PROBABLE CAUSE

See Commonwealth v. O'Day, 56 Mass. App. Ct. 833 (2002), further appellate review **granted** 439 Mass. 1101 (warrant invalid because police did not have probable cause to believe drugs were at defendant's residence although they had probable cause to believe defendant was selling drugs).

An informant advised the police that the defendant, the doorman at DJ's Pub in Brockton, had sold him drugs at DJ's. Id. at 834. The police set up surveillance and observed the defendant make several sales at DJ's. Id. at 834. They police also set up surveillance of the defendant's house and observed the defendant go directly to DJ's on two occasions when he sold drugs at DJ's. Id. at 834-35. No known drug users were seen near the defendant's house, nor was anyone seen carrying anything into or out of the defendant's house. Id. at 840. The Court said that the evidence was insufficient to establish probable cause that drugs would be found at the defendant's home. Id. at 840.

SEARCH AND SEIZURE: FRUIT OF POISONOUS TREE AND CONSENT

See Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812 (2002). (consent was invalid because police attempted to obtain consent minutes after police illegally entered home). Id. at 815, 817. See **search and seizure: entry of home without a warrant.**

SEARCH AND SEIZURE: FRUIT OF POISONOUS TREE AND INEVITABLE DISCOVERY

See Commonwealth v. Blevines, 438 Mass. 604 (2003)-. Cocaine found by shining light in car was suppressed as product of illegal use of keys seized from defendant. (See casenote under **search and seizure: arrest**, supra).

SEARCH AND SEIZURE: FRUIT OF POISONOUS TREE AND INEVITABLE DISCOVERY

See Commonwealth v. Barros, 56 Mass. App. Ct. 675 (2002) (clothing and shoes observed in defendant's bedroom were suppressed as product of statements obtained in violation of Miranda).

The doctrine of inevitable discovery only applies if the police can show they would have inevitably discovered the evidence by lawful means. The doctrine of inevitable discovery did not

apply in this case even though the police claimed that they would have inevitably observed the shoes and clothing in the defendant's bedroom when they executed a default warrant they had for his arrest. Id. at 679.

The police testified that although they had a default warrant for the defendant's arrest they did not intend to execute the warrant unless their interview with the defendant about a murder case was productive. The default warrant was only to gain entrance to the defendant's home so they could question him. The police told the defendant that they had a default warrant for his arrest and then began to question him in a small room in his house without giving him Miranda warnings. At the time the defendant was dressed in a T-shirt and boxer shorts. The police asked the defendant if he had a paint ball gun; the defendant said he only had a box for one and took the police into his bedroom to show them the box. The police then observed sneakers in the bedroom which appeared to have blood on them. At that point the police put the defendant under arrest on the default warrant. Id. at 676-77.

The police argued that they would have inevitably discovered the sneakers and clothing by executing the default warrant, taking the defendant into custody, and permitting him to get dressed in the bedroom. The Court rejected this argument because the prosecution had failed to prove that the police would have executed the default warrant absent the illegal questioning. Id. at 679-680.

SEARCH AND SEIZURE: REASONABLE SUSPICION; FRUIT OF POISONOUS TREE; WHEN SEIZURE OCCURS

See Commonwealth v. Swanson, 56 Mass. App. Ct. 459 (2002) - **See search and seizure: entry of home without a warrant**.

SEARCH AND SEIZURE: REASONABLE SUSPICION; TRYING KEY IN A LOCK

See Commonwealth v. Dora, 57 Mass. App. Ct. 141 (2003) (trying a key in the lock of a door only requires reasonable suspicion).

The police in this case took keys which the victim had found after the break into her apartment and tried them in the lock of the defendant's apartment door. Since the police had reasonable suspicion to believe that the defendant had committed the break, the turning of the key in the lock of the defendant's door was not illegal. Id. at 143.

The victim of a breaking and entering and sexual assault found the defendant's keys in her apartment after the break. A neighbor identified the defendant as the man she had seen jump out of the victim's window, and the defendant fit the general description which the victim had given. The defendant gave the police his address, and told them that he had lost the keys to his apartment. Id. at 142.

The police took the keys which the victim had found, used them to open the front door of the defendant's apartment building, and then proceeded to the defendant's apartment where they tried the key in the lock of the defendant's door. When they found the key worked, they had the defendant arrested. Id. at 143.

SEARCH AND SEIZURE: REASONABLE SUSPICION; MOTOR VEHICLE STOP

See Commonwealth v. Riggieri, 438 Mass. 613 (2003) (police may stop car for motor vehicle violation based on dispatcher's report even if they do not observe violation). Appeals Court overruled

The police may rely on a dispatcher's report so long as the dispatcher has reasonable

suspicion to believe that the occupant of car has committed a crime. Id. at 616-17.

In this case the dispatcher recognized the caller as an off duty police officer who advised the dispatcher that an identified motor vehicle was being driven erratically. Id. at 614. The off duty police officer gave the dispatcher regular updates as to the progress of the motor vehicle. Id. at 614. The car was stopped on the basis of the call, even though the police officer who made the stop had not observed any violations. Id. at 615. The report was from a reliable informant because the dispatcher reasonably believed the caller to be an off duty police officer who was known to him. Id. at 616-17.

SEARCH AND SEIZURE: REASONABLE SUSPICION; MOTOR VEHICLE STOP
See Commonwealth v. Emuakpor, 57 Mass. App. Ct. 192 (2003) (stop based on description from dispatcher and reaction of occupants in motor vehicle was based on reasonable suspicion).

Police can stop a motor vehicle if they have reasonable suspicion based on objective facts that the motor vehicle has been involved in a crime. The stop of the car in this case was found to be reasonable when it occurred a few minutes after an armed robbery at a location consistent with time necessary to travel from the scene, and matched the general description given by the dispatcher.

A police officer received a radio broadcast that an armed robbery with a gun had occurred at the Emerald Square Mall involving two black males who had fled in an older, grey, two door vehicle. Id. at 193-94. The police officer knew that the only exit from the Mall emptied onto Route 1 and it would take 5-6 minutes to drive from the Mall to his position on route 1. 2-4 minutes after receiving the broadcast, the police officer saw an older, grey four door car containing 3-4 black males, traveling south on Route 1, away from the Mall. The officer followed in his unmarked car and noticed that when a marked police vehicle passed the occupants of the grey car all reacted by bending down and turning around to see where the police car had gone. Based on the description and the reaction of the occupants he stopped the car. Id. at 194-95.

The stop was upheld as reasonable despite two minor differences in the description and the appearance of the car and its occupants. Simply because only two people were observed robbing the store and three or four were seen in the car was not significant since "visible robbers sometimes act with invisible cohorts." Id. at 197. Similarly the inconsistency in the number of doors was not significant since a reasonable officer might conclude that the witnesses were mistaken as to the number of doors on the car. Id. at 198 (There was one other minor discrepancy which was dealt with at Id. at 194 n. 3. The car was actually a blue car. The Court states that since it was dark outside both the witnesses and the police officer mistakenly assumed it was grey).

Although the police approached the car with guns drawn after the stop, this did not convert the stop into an arrest since this type of precaution was reasonably necessary in a situation where an armed robbery with a gun had been reported. Id. at 199.

SEARCH AND SEIZURE: REASONABLE SUSPICION; MOTOR VEHICLE STOP
See Commonwealth v. Cox, 56 Mass. App. Ct. 907 (2002) (reasonable suspicion found, police officer could rely solely on report from motorist).

A police officer may stop an automobile for a motor vehicle violation based solely on a report from a motorist if the motorist is a reliable informant with personal knowledge.

In this case a police officer received a dispatch that a motorist behind a "white Dodge Dakota pickup truck, Massachusetts plate number 4274PY" had seen the truck "all over the road,

possibly drunk, going over the lines, swerving back and forth." Id. at 908. The police officer observed a truck matching this description and a Ford coupe which was following behind. The driver of the Ford coupe was pointing to the truck, and continually flashing her lights on and off. Id. at 909. The officer stopped the truck.

The Court said the stop was valid. The driver of the Ford coupe had personally observed the truck's violations, and she was not a faceless informant but had been willing to identify herself by pointing to the truck and flashing her lights off and on. Id at 909.

SEARCH AND SEIZURE: REASONABLE SUSPICION

See Commonwealth v. Doocey, 56 Mass. App. Ct. 550 (2002) (reasonable suspicion for stop and frisk based on report of gun being fired; general description of suspect matched defendant who was close to incident in time and place).

At 3:24 a.m., the dispatcher received information from an identified citizen-witness who stated that she had just heard shots fired from the M street park in South Boston, which was directly across from her residence. She had also observed two males dressed in black clothing leaving the park. Id. at 551. Two minutes later another identified informant, who was thirty yards from the park, stated that he had just seen two men walking down Second Street in the direction of L Street. Id. at 551-52. Twelve minutes after the original bulletin and one half mile from the park, a police officer observed the defendant walking on L Street. The defendant was wearing a dark navy blue nylon jacket and blue jeans. The streets were deserted and no other person was in the area. It was 3: 36 a.m. Id. at 552.

The officer approached the defendant who appeared intoxicated and uneasy. Id. at 553. The officer conducted a pat frisk of the defendant and discovered a gun. Id. at 553. The Court stated that if the stop was justified then the frisk was justified because the police were justified in believing that whoever had fired the shots had a firearm and was prepared to use it. Id. at 553.

The Court said that the stop was justified. The mere fact that the suspect was dressed in a dark navy jacket and blue jeans and this description was close to the description of black clothing was not in itself enough to justify a stop; however, here the defendant was also the only person present in an area where the suspect was seen headed within a short period of time after the shots were fired. Id. at 557-58.

SEARCH AND SEIZURE: REASONABLE SUSPICION; WHEN ARREST OCCURS

See Commonwealth v. Preshaw, 57 Mass. App. Ct. 19 (2003) (reasonable suspicion that defendant involved in breaking and entering justified pat frisk for weapons and handcuffing defendant).

The defendant was identified by a neighbor as being involved in a break of a house which had just been secured by the police. The police detained the defendant, handcuffed her and frisked her because they were concerned for their safety. Id. at 28. The Appeals Court held that the police had reasonable suspicion to believe the defendant was involved in a housebreak and this justified them in handcuffing and frisking the defendant. Id. at 28. The fact that the defendant was handcuffed and frisked did not convert the seizure into an arrest. Id. at 28 n. 9.

SEARCH AND SEIZURE: REASONABLE SUSPICION; WHEN SEIZURE OCCURS; WHEN ARREST OCCURS

See Commonwealth v. Scott, 57 Mass. App. Ct. 36 (2003), further appellate review **granted** 439 Mass. 1101 (reasonable suspicion justified asking defendant to sit in cruiser; reasonable suspicion

based on general description, proximity time and place and other evidence).

When the police officer asked the defendant to come back and talk to him this was not a seizure but when the officer told the defendant to stop and remain still this was a seizure. Id. at 37-38.

Neither evasive behavior, proximity to a crime, or matching a general description is sufficient by itself to create reasonable suspicion; however, they are factors which when combined may create reasonable suspicion. Id at 39.

Here there was reasonable suspicion because the defendant was at the same location where two prior rapes had occurred at the same time of night; the defendant fit the general description of the rapist (tall muscular black man with short hair); and the police were familiar with the composite of the rapist and had this in mind when they observed the defendant. Id. at 39.

The defendant was not placed under arrest when he was ordered to sit in the cruiser. In order to decide whether a person is under arrest the Court should consider length of encounter, nature of inquiry, possibility of flight and danger to the officers. Here it was not unreasonable to ask the defendant to sit in the cruiser since the defendant had no identification and the stop occurred in an open area near a public highway. Id. at 40.

SEARCH AND SEIZURE: WIRETAP WARRANT, RETURN, PARTICULARIZATION, MINIMIZATION.

See Commonwealth v. Ricci, 57 Mass. App. Ct. 155 (2003) (violation of return requirement of wiretap statute was slight and inadvertent so suppression not required; no violation particularity or minimization requirement).

The state wiretap statute, G.L. c. 272, §99 I, requires the return to the warrant to be filed within seven days after termination of the warrant. A slight delay in complying with the seven day rule will not result in suppression where the prosecution has acted in good faith, has not gained any tactical advantage, and there is no evidence the tapes have been compromised. Id. at 162.

The return in this case was filed ten days after termination of the warrant. An assistant district attorney testified at the suppression hearing that his office had mistakenly assumed that the termination date was October 7 rather than September 22, and the return had been filed as soon as possible after the mistake was discovered. The motion judge found that there was no credible evidence of any tampering with the tapes. He found no violation which required suppression, and the Appeals Court upheld this finding. Id. at 162-63.

The Court also found no violation of the particularity requirement. The wiretap warrant must contain a particular description of the person and place, premises or telephone line upon which the interception is to be conducted and must particularly describe the nature of the communication to be intercepted. It need not describe all persons whose communications might be intercepted. Here the wiretap warrant permitted interception of the conversations of: " Vincent Ricci, Henry 'Rico' Festa and their associates, agents and co-conspirators, some of whom have yet to be identified, which relate to the possession and/or distribution of cocaine, or conspiracy to commit the same." This did not violate the particularity requirement.

The Court also found no violation of the minimization requirement. The Federal wiretap statute also requires that the warrant shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. The affidavit in support of the warrant contained nine pages of instructions which were to be followed to minimize interception of nonpertinent calls, and the warrant specifically referred to these instructions. At

the suppression hearing, the judge reviewed some 617 calls and only suppressed four for noncompliance with the minimization requirement.

SENTENCE: RESTITUTION

See Commonwealth v. Cromwell, 56 Mass. App. Ct. 436 (2002) (defendant convicted of operating under the influence may be ordered to pay restitution for any injuries caused).

The Appeals Court holds that even though property damage is not an element of the offense of operating under the influence there was sufficient evidence of the defendant's responsibility for causing damage to the victim's car. Payment of restitution is limited to the economic losses caused by the conduct of the defendant and documented by the victim. Id. at 441-442..

The defendant was charged with and convicted of operating under the influence. During the trial, evidence was presented that the defendant's car had struck the victim's car. In the sentencing phase, the prosecutor stated that the victim's car had been totaled, so the judge ordered a restitution hearing. At the hearing, three documents were introduced as exhibits which indicated that a bank was looking for the unpaid balance of the victim's car loan. Id. at 441. The judge ordered the defendant to pay this unpaid balance, and this decision was upheld by the Appeals Court.

SENTENCE: UNCHARGED CONDUCT

See Commonwealth v. Henriquez, 56 Mass. App. Ct. 775 (2002). Further appellate review **granted** 438 Mass. 1108. (Appeals Court orders case sent to another judge for resentencing because judge took into account uncharged conduct when sentencing, and it was not clear that the uncharged conduct was considered for a proper purpose).

A defendant may not be punished for uncharged conduct, id. at 778, however, a judge in sentencing may take uncharged conduct into consideration if based on reliable evidence, considered for a proper purpose, and not used to punish the defendant. Id. at 779.

The defendant in this case pled guilty to raping his daughter between May 1, 1999, and October 18, 1999. The prosecutor in describing the facts said that the rape occurred when the victim was in first and second grade. The defendant agreed that the facts stated by the prosecutor were true. Id. at 776.

The prosecutor in her sentence recommendation asked for a sentence of 45 to 60 years and told the judge that the abuse had been going on for two years. Id. at 776. The judge imposed a sentence of 45 to 60 years and stated that one of the reasons that she was deviating from the sentencing guidelines was because she believed the abuse had been going on "for the last couple of years." Id. at 778. She did not explain this statement.

The Court stated that since the judge had said without explanation that she was going over the guidelines because she believed the defendant was guilty of uncharged conduct, the Court could not say, in the absence of any further explanation, that the defendant had not been punished for uncharged conduct. Id. at 781.

SEXUALLY DANGEROUS PERSON: MEANING OF "LIKELY" IN COMMITMENT STATUTE

See Commonwealth v. Boucher, 438 Mass. 274 (2002) ("likely" to commit offense in SDP statute does not mean more likely than not; it is for trier of fact to decide what "likely" means).

The SDP commitment statute, c. 123A, § 1, calls for commitment of a person who has been convicted of a sexual offense and who suffers from a mental abnormality or personality disorder "which makes the person likely to engage in sexual offenses if not confined to a secure facility." Commonwealth v. Boucher, 438 Mass.at 275.

In this case the SJC rejected the argument that "likely" meant more likely than not. Instead it said, "In assessing the risk of reoffending, it is for the fact finder to determine what is 'likely.'" The fact finder should analyze a number of factors, "including the seriousness of the threatened harm, the relative certainty of the anticipated harm, and the possibility of successful intervention to prevent harm." Id. at 276.

SEXUALLY DANGEROUS PERSON: EVIDENCE; PROBABLE CAUSE DETERMINATION

See Commonwealth v. Reese, 438 Mass. 519 (2003) (ordinary rules of evidence apply in sexually dangerous person cases and probable cause hearings in such cases; Myers bindover standard applies; judge's finding of no probable cause reversed).

G.L. c. 123, s. 14(c) authorizes admission in evidence in an SDP commitment trial of "any other evidence tending to show that person is or is not a sexually dangerous person." Reese holds that this clause only authorizes the admission of evidence "that is independently admissible under the rules of evidence." Commonwealth v. Reese, 438 Mass. at 527. It also holds that the ordinary rules of evidence apply to probable cause hearings in SDP cases. Thus, learned treatises are not admissible in such cases unless they would be admissible under the ordinary rules of evidence. They are not admissible as exhibits but can only be used in cross-examination if the expert concedes that the treatise is authoritative. It was improper in this case for the judge to consider an article on risk assessment authored by Dr. R. Karl Hanson, which was simply admitted as an exhibit. Id. at 526-27.

The SJC follows the decision of the Appeals Court in Commonwealth v. Blanchette, 54 Mass. App. Ct. 165, 173 (2002), which held that the standard for probable cause in an SDP hearing is the same standard that exists in ordinary criminal bindover hearings (a directed verdict standard) as articulated in Myers v. Commonwealth, 363 Mass. 843, 850 (1973). Commonwealth v. Reese, 438 Mass. at 522-23. Credibility determinations are left to the ultimate fact finding except in cases where the evidence is "so incredible" that no reasonable person could rely on it. Id. at 524.

The judge in this probable cause hearing found that the testimony of the prosecution expert was "so incredible" that no reasonable fact finder could rely on it, but the SJC reversed on the ground that the judge's finding was really based on an assessment of the expert's credibility. Id. at 525-26. The SDP statute requires a finding that the defendant suffers from a "mental abnormality or personality disorder" and the prosecution expert testified that the defendant suffered from "pedophilia" even though he did not meet one of the features of the diagnosis set forth in DSM-IV. The expert testified that the DSM-4 was only a diagnostic tool and is to be used in conjunction with the expert's clinical expertise. The SJC said that the judge's ruling was a credibility determination based on his own opinion as to the proper application of the DSM-IV and the significance of the difference between the expert's testimony and the DSM-IV text. Id. at 525-26.

YOUTHFUL OFFENDERS:TRANSFER TO ADULT COURT

See Commonwealth v. Davis, 56 Mass. App. Ct. 410 (2002) (when judge transfers individual who commits crime before his seventeenth but after his eighteenth birthday, judge need not make written subsidiary findings; record need only support finding of probable cause and show judge did not abuse discretion).

The defendant was identified as having shot and killed the victim in 1990 when the defendant was sixteen. He was not apprehended until 1999, when he was twenty five. Id. at 411-412. A juvenile judge held a hearing at which both sides were able to present evidence and argue case. Based on an eyewitness identification, the juvenile judge found probable cause to believe the defendant had committed murder, and that the interests of justice would be served by having the defendant sent to adult court. She made no subsidiary findings. Id. at 411-412.

The Appeals Court did not decide whether the 1990 law or the 1996 amendment applied, because it found that neither law required written subsidiary findings in this case. Id. at 413 n. 7. The Court stressed that the only options open to the judge under G.L. c. 119, s. 72A were to either discharge the defendant or transfer him to adult court. This was not a case under old G.L. c. 119, s. 61, in which the judge had to decide whether to try a person as a juvenile or an adult and in which the statute required the judge to make written subsidiary findings. Commonwealth v. Davis, 56 Mass. App. Ct. at 415.

The Court held that all that was required was a showing that the record supported a finding of probable cause and that the judge did not abuse her discretion in deciding whether to transfer or discharge. No written subsidiary findings were required. Id. at 415-16.